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THE WARD TRIAL

The February number of the Law Reporter contained, without editorial comment, a review of the article upon this trial, which appeared in the July number of the present volume, p. 121. Some reply to the positions taken in that article, some deprecation of the censure which not this community alone, but public opinion, has uttered against the participants in that disastrous acquittal of the prisoner, was expected by the writer. It was not supposed that either his notice of the trial, or his comments upon the management of the defence, would receive the unanimous approbation of the Kentucky bar.

> "In law, what plea so tainted and corrupt,
> But being seasoned with a gracious voice,
> Obscures the show of evil. In religion,
> What damned error but some sober brow
> Will bless it and approve it with a text."

The temper of the review betrays the weakness of a bad cause, and although neither the dignity of its tone, nor the courtesy of its style, nor the force of its argument, entitles it to a reply, yet as it probably contains the best defence which can be urged in favor of the counsel through whose successful exertions the law was perverted, the profession

injured, and justice defeated and trampled under foot, we shall answer at length the positions of the reviewer. The iniquity of the trial will thus be rendered still more apparent, from the feebleness of the only justification of any part of the proceedings which has yet appeared.

In the brief history of the case which formed the introduction to the notice of the trial, we said that when the verdict was announced, it "created in Louisville the most intense indignation." As evidence of the correctness of this assertion, we stated several facts: 1st. The jury, the prisoner, the "swift witness" for the defence, and even some of the counsel, were burnt in effigy. 2d. Mr. Ward's house, prudently vacated, was attacked by a mob, and injured by fire." Both of these statements are not only not denied, but admitted by the reviewer to be true. 3d. A public meeting was held in which the trial and the parties concerned in it, "were severely denounced, and resolutions sympathizing with Mr Butler's family were passed." To render this proof of public indignation the more striking, we described the meeting as "remarkable, not only for its extraordinary numbers, being the largest ever held in Louisville, but equally so for the character of the persons who composed it, and directed the proceedings. It was not a tumultuous mob, nor assembled by persons ever ready to take advantage of any occasion of public excitement. It was mainly constituted of, and altogether directed by intelligent, educated, and influential citizens, who appeared to feel with solemn conviction, that the verdict had done foul wrong to the name and honor of Kentucky, and had converted the proceedings of justice into a contemptible farce."

This account of the character of the meeting is pronounced by the reviewer to be "*a vile slander upon the intelligent, educated, and influential citizens of Louisville.*" It is elsewhere, in connection with other statements, denounced in the following language:—"A more unfair presentation of this case, or a *grosser perversion of all truth has seldom been embodied in the same number of words.*"

To satisfy the demands of *truth* and *justice*, the reviewer proceeds to give what he professes to be, an "*authentic* history of this peaceable, quiet and orderly meeting."

Accordingly he produces a copy of an incendiary handbill, headed, "To the Wolfe Bloodhounds of Louisville,"

alluding to a rhetorical flourish used by Mr. Wolfe in his argument on the trial, stigmatizing the citizens of that place as pursuing the prisoner with "bloodhound avidity;" he describes at great length the outrages committed upon the property of Mr. Ward senior, and the other proceedings of an infuriated and reckless mob, "estimated at between two and three thousand, assembled around his mansion."

It is to this rabble, thus collected, and thus conducting, that the reviewer assumes our description was intended to apply.

From the evidence furnished by the report of Ward's trial, it appears allowable in Kentucky to misstate the positions, and to garble the evidence of an opponent. The reviewer has improved upon the practice, and invented the slander which he triumphantly refutes.

No one can read the original article and fail to perceive that the transactions of that terrible mob were cited only as one set of circumstances, showing the indignation excited in the popular mind by the verdict for the prisoner. When we said that "by a not unnatural process of mind, this deeply seated and irrepressible indignation turned itself against the prisoner's counsel, and especially against the distinguished gentleman who volunteered his services," no one but the reviewer could fail to perceive that we alluded to the general indignation which was felt, not in Louisville alone, nor in Kentucky alone, but throughout the United States. The existence of this feeling it is idle to deny. For two months after the verdict was rendered, scarcely a newspaper from any part of the country failed to contain an exhibition of it.

The meeting to which we alluded, and of the proceedings and character of which the reviewer is not ignorant, was assembled by a summons very different from the one he has produced. To demonstrate the accuracy of our description; to show the true nature of the meeting; to exhibit the solemn conviction which appeared to pervade it; to efface the new stain which one of her own sons has thrown upon the fame of Louisville, already deeply sullied by an appalling assassination and the outrages of a furious mob; we append the full account of it, as contained in the Cole report.

"The news of this verdict was received in the city of Louisville, as it has since been throughout the State of Kentucky, and over the entire Union, with the greatest

indignation. In Louisville, especially, where it was published on the morning of Friday, April 28th, the excitement immediately produced was intense. But little business was done on that day or the next. All men seemed to think that an indelible stain had been fixed upon the fair fame of the State, by the mockery of a trial that had been had, and the iniquitous verdict that had been rendered; and the oldest, most substantial, and most respected citizens, demanded a public meeting, that the city of Louisville might cleanse itself of the disgrace that would otherwise rest upon it. In the newspapers of Saturday morning appeared the following:

'NOTICE.—A meeting of the citizens of Louisville favorable to the erection of a monument to the memory of the late lamented PROFESSOR BUTLER, is requested at the Court House, on Saturday evening, April 29th, at early gas light.'

Pursuant to this call, the largest and most respectable assemblage that has ever convened in the city, gathered within and around the Court House at an early hour in the evening. The number present has been variously estimated at from eight to twelve thousand. The west room in the second story of the building, was filled at a very early hour. Several old, universally known, and generally esteemed citizens had been requested to act as officers, but the press was so great that the principal of them could not effect an entrance to join those who were earlier in their attendance. Some delay in effecting the organization was thus induced, and, during its continuance, Sherrod Williams, on request, addressed the meeting. Mr. Williams fully recognized the justice of indignant feeling that had moved, as it were, a whole community, and expressed his own deep sympathy with it, but deprecated violence to person or property, and besought people to content themselves with a warm and decided expression of their sentiments with reference to the crime which had been committed, and the mockery of a trial that had been had of its guilty perpetrator. Mr. Williams was listenend to with the most respectful attention; but the crowd outside, which was continually augmented by fresh arrivals, became impatient to know what was going on within. It was, therefore, agreed to go below; but when most of those who were up stairs had got down, anything like a satisfactory organization there was found to be impossible. It was, therefore, proclaimed

that the regular meeting would organize above, and that, after resolutions should be reported and passed, they would be sent down for ratification. On returning to the large room above, Gen. Thomas Strange was chosen President, and Mr. George Anderson Secretary. Gen. Strange made a brief but appropriate and forcible address on taking the chair, at the close of which, on motion, John H. Harney, Theodore S. Bell, Bland Ballard, W. D. Gallagher, W. T. Haggin, Edgar Meedham, and A. G. Munn were appointed a committee to draft resolutions. While this committee was absent, Rev. J. H. Heywood was requested to address the meeting, which he did with his accustomed beauty and effectiveness. Before the return of the committee Bland Ballard read the subjoined resolutions which were received with the most decided approbation, and carried by a unanimous vote of the assemblage.

'The citizens of Louisville assembled in public meeting for the purpose of giving expression to their opinions respecting the trial and the verdict of the jury in the case of the *Commonwealth* v. *Matt. F. Ward*, recently tried in the Hardin County Court, do submit to the public at large, but more especially to the citizens of the Commonwealth of Kentucky, the following resolutions, as expressive of their views of the matters therein referred to:

1. *Resolved*, That the verdict of the jury recently rendered in the Hardin County Circuit Court, by which Matt. F. Ward was declared innocent of any crime in the killing of William H. G. Butler, is in opposition to all the evidence in the case, contrary to our ideas of public justice, and subversive of the fundamental principles of personal security, guaranteed to us by the constitution of the State.

2. *Resolved*, That the criminal laws of this Commonwealth should be so administered that every citizen may feel secure from insult, injury and violence, both in person and occupation, and that the omnipotent power of public opinion should at once be so directed as to discountenance and condemn all attempts to thwart the ends of public justice, and to cause the practical realization that manslaying is, in fact, the highest crime known to society.

3. *Resolved*, That the published evidence given on the trial of Matt. F. Ward, shows beyond all question that a most estimable citizen, and a most amiable, moral and peaceable man has been wantonly and cruelly killed, while in the per-

formance of his regular and responsible duties as a teacher of youth; and notwithstanding the verdict of a corrupt and venal jury, the deliberate judgment of the heart and conscience of this community pronounces that killing to be murder.

4. *Resolved*, That the charges of vindictiveness and cruelty preferred against the citizens of Louisville by a portion of the counsel for the defence of Ward, is a vile and unmerited slander, and we proclaim that each and every imputation cast upon our esteemed fellow citizen, Dr. D. D. Thomson, and our neighbors' children, the pupils in Professor Butler's school, is utterly groundless and unjustifiable.

5. *Resolved*, That the public press of this Commonwealth should be so conducted as to be recognized as the conservator of public morals, and that a failure of any portion of the press to rebuke and condemn an atrocious crime against society, tends to debauch the public virtue and to destroy the public morals.

6. *Resolved*, That in the death of Wm. H. G. Butler, his family have lost a most devoted, affectionate, faithful son, brother, husband and father; the cause of education a most accomplished friend and advocate, one whose talents and acquirements placed him in the front of his useful and honorable profession; and that society has lost one of its purest and best members, whose life is unspotted by a single blemish—as gentle and noble a spirit as ever breathed.

7. *Resolved*, That in token of our respect and affection for, and as an evidence of our appreciation of, W. H. G. Butler, we will at once take measures for erecting a monument to his memory, and to present his widow a substantial token of our regard for her.

8. *Resolved*, That we regret and condemn every manifestation of disorder, and we exhort all good citizens by their reverence for law, by their own self-respect, and by their love of the virtues of him whose loss we deplore, to abstain from violence to persons or property, and from every disregard of law and order—remembering that society cannot exist without order, and that he whom we revered when on earth, was incapable of meditating harm to any one, and that every wrong committed will wound his pure and lovely spirit.'

So soon as the resolutions were passed, the Committee retired with them to the crowd below, where they were

read by Sherrod Williams, and carried with equal unanimity. *After the Committee left the meeting above*, resolutions were moved and carried, requesting the two Wards to leave the city; inviting Matt. Wolfe to resign his seat in the State Senate; and requesting John J. Crittenden to resign his place in the Senate of the United States, to which he was elected by the Legislature of Kentucky last winter.

By a portion of the immense crowd outside, *another meeting* was organized, by which *another* series of resolutions was passed, equally condemnatory in their tone with those passed by the regular meeting in the Court House, as to the trial, and the verdict, and much more sweeping in their references to individuals who had rendered themselves obnoxious in different ways by their connection with the trial, several of whom were singled out by name for public censure.

By a large number of persons in the Court House yard, after the regular meeting in the west room had adjourned, effigies were hung up and burned, of Matt. Ward, Barlow (the false witness), and numbers of the Hardin County jury and a number of other persons, who, by their acts, had subjected themselves to the deep displeasure of the people of Louisville.

Earlier in the evening a crowd of men and boys gathered in front and at one side of the private residence of Robert J. Ward, doing considerable damage to the conservatory with stones, and with the same missiles breaking some of the front windows. While this was going on, effigies of Matt. and young Robert Ward were strung up in front of the door. These were afterwards set on fire, when some person unknown caught one of them up and threw it against the front door, which was thus set on fire. The alarm was at once given, several engines were soon on the spot, and after encountering a somewhat decided but by no means stubborn opposition from the men and boys near the house, the flames were extinguished."

"As the closing sheets of this report go to press, a week has passed since these occurrences took place. No one pretends to excuse or defend the lawless depredations committed upon the private residence of Robert J. Ward. Every good man condemns them as wrong, uncalled for, and reprehensible, but the heart of the whole city beats as one pulse, and nobly responds to the manly, decided, and conservative tone of the series of resolutions embodied in this

closing narrative, as passed by the meeting of citizens as held in the Court House."

It may suit the purposes of the reviewer to confound with the proceedings of a mob the passage of these resolutions; to pronounce our description of the meeting which passed them "a vile slander on the citizens of Louisville;" to represent the account we have quoted as a gross perversion of the truth; and to exhibit the dignified spirit in which eight or ten thousand men expressed their abhorrence of a trial, the result of which they felt had disgraced their State, as the ebullitions of malignity and prejudice emanating from a partisan source. But "there is a holy mistaken zeal" in friendship, "as well as in religion," and calm observers will perceive in this attempt only the rashness of an unscrupulous advocate or the desperate necessity of a feeble cause.

If it be, as the reviewer says, "a statement *utterly* destitute of truth" (although his own account and that we have copied from the Cole report prove it to be otherwise), "that deputations and addresses from all parts of the State have urged Mr. Crittenden to resign his seat in the United States Senate," the citizens of Kentucky have probably saved themselves useless trouble. If it be untrue "that a society in a neighboring State withdrew its invitation to him to officiate upon some public occasion" — we rejoice that the society did not, by its own fault, lose an address which would undoubtedly have been an interesting and a learned one; if a convention of medical gentlemen in St. Louis did *not* so far "forget their self-respect as openly to insult him," we rejoice most heartily that the imputation is removed from a portion of that useful, honorable and noble profession.

The statements we made were founded upon information continually appearing in the newspapers of the day, and were then, and are now, generally believed to be true. But we lay no stress upon them. Their truth or falsity in nowise affects our main position, that, by a not unnatural process of the human mind, public indignation at the escape of a prisoner whom the universal heart of the nation declares to be a murderer, turned itself against the counsel for the defence, and especially against the only one whose name was known beyond the borders of his native State. This indignation then existed and still exists in Kentucky. It may, upon the memorable evening when the resolutions

were passed, as the reviewer asserts, have been expressed against Mr. Crittenden, solely because he volunteered—but if, now that his course upon that trial is fully understood, not only "from the partisan source which so perseveringly and malignantly misrepresented him," but from the statements of persons who were present, and more than all, from the report of the trial to which Matt. Ward himself appeals —now that his cruel attempt to destroy the reputation of an innocent man to secure the acquittal of a cold-blooded assassin, has been exhibited before them, that indignation shall not gather force and permanence, we shall believe, in in the language of the resolutions, that public virtue is already debauched, and public morals already destroyed.

We turn now to the comments of the reviewer upon that incident in the trial, which, next after the verdict, most deserves reprobation. We allude to the admission of Robert J. Ward, Jr. as a witness for his brother.

The title of the case, as given in the New York report, is *Commonwealth of Kentucky* v. *Matt. F. Ward & Robert J. Ward, Jr.* The indictment charges Matthews F. Ward with murder in the first degree, committed on William H. G. Butler, on 2d Nov., 1853, by shooting him with a pistol, the ball of which took effect in his left breast, and caused his death on the 3d Nov. Robert J. Ward, Jr., is charged with *aiding and abetting* in the second count, and *as a principal* in the first count of the indictment, p. 7. "Mr. Helm moved that the prisoners be tried separately. The court granted a severance, but left to the Commonwealth's Attorney the privilege of deciding which of the defendants should first go to trial. The prosecutor desired that Matthews F. Ward, as the principal in the case, should be tried first. The defendant entered a plea of Not Guilty." p. 8.

Robert J. Ward, Jr. was not discharged from custody until after the acquittal of his brother, when a *nolle prosequi* was entered in his case.

While, therefore, the indictment was pending against Robert J. Ward, Jr., *as a joint principal* with his brother, the defence moved for leave to introduce him as a witness in behalf of his co-defendant. This motion was opposed by the government, and after elaborate argument on both sides, the court admitted him to testify.

In commenting upon this ruling, we used the following language: "Perhaps the counsel understood the court as

well as they understood the the inclination of the jury, and hence a ruling disgraceful even to a court of '*Kentucky justice.*' We do not propose to argue the incompetency of this witness. No lawyer can have a doubt upon the point. The responsibility of such gross departure from the plainest principles of law rests between Mr. Crittenden who urged, and the judge who allowed it."

To these positions the reviewer replies that "the judge, upon full argument, before the occurrence of this case, had decided the question the same way."

Before proceeding to the remainder of the reviewer's reply, we must notice a remarkable fact connected with the introduction of Robert Ward as a witness, which does not appear in the New York report. Robert Ward was not offered as a witness till the *fourth day* of the trial. At the close of the *third* day, Mr. Caldwell, one of the nine counsel for the prisoner, stated that "the defence had *closed their testimony*, but, as it was near night, and they wished an opportunity to consult, he would ask the court to adjourn till morning." (Cole Report, p. 48.)

Upon the morning of the fourth day, Mr. Wolfe stated that the defence wished to call some more witnesses. Accordingly John Judt was produced, for the purpose of contradicting "little Pirtle." Then R. W. Adams was called, and was asked, "If he ever knew Matt. F. Ward to purchase pistols and have them loaded at different times before this occurrence." The question was not allowed, and this witness did not testify. Then Mr. Crittenden said he "wished to prove by Mrs. R. J. Ward, that in a conversation that occurred a month or two before this transaction, Mr. Stargus, the assistant teacher, had become so excited against Matt. F. Ward, as to leave a hostile and threatening letter with the mother, and requested her to deliver it to the son." (Cole Report, p. 50.) This testimony was also rejected. Then Mr. Crittenden said that he wished to introduce Robert J. Ward, Jr., as a witness, and his testimony closed the evidence in chief.

We give this narration as showing that the introduction of R. J. Ward, Jr., was an after-thought. It is impossible to believe that *nine counsel* were, all of them, ignorant of the testimony he was ready to render — or had forgotten the only witness who could bring "order out of disorder," and discovered their omission only upon consultation after having closed their case. It is evident that they

placed this witness in the same category with the other evidence which they offered upon the same day. They made a bold attempt to introduce incompetent testimony, failed in two instances and succeeded in a third, and the remark that we made, without intending any imputation upon the integrity of the judge, but which we hazarded as a mere conjecture that the counsel *understood* the court[1] as well as they understood the inclination of the jury, is fully sustained by the reviewer, who says that the same judge had decided the same point the same way upon a previous occasion. It is not unlikely that this decision, not "spoiled by being printed in a book," was first made known to Mr. Crittenden upon this consultation.

To our strictures upon this ruling, the reviewer further replies: "Admitting that the decision was wrong, we put it to the candor of every impartial mind to say, if Mr. Crittenden would not have failed in the discharge of his duty to his client if he had not argued the admissibility of this evidence, and left it to the judge to decide. But we hold that the decision was right, notwithstanding the broad assertion that no lawyer can have a doubt on the point, and that it was in strict accordance with the long established course of adjudication in the State of Kentucky." "Our courts, governed as they have been by the genius and spirit of our institutions, have never hesitated to admit witnesses to testify upon oath in behalf of the defendant, and as an accomplice jointly indicted could testify for the commonwealth, in the same liberal spirit he was also held competent for the defendant *when not jointly tried with him.*[2] It is conceded on all hands, where there are separate indictments, that an accomplice is a competent witness for the defendant. Our courts, however, have decided that his incompetency cannot depend upon the will of the Attorney for the Commonwealth, in drawing up a separate or a joint indictment.

[1] The Reviewer's sensitiveness in regard to this phrase, is amusing. We have heard it said of a distinguished advocate at our own bar, that before his argument in any case, was half through, he could almost always make up his mind correctly which way the jury were inclined. We have no doubt that the counsel for the defence in Ward's case, fully understood the inclination of their jury. It would be otherwise difficult to reconcile some of their declamation with the possession of even a moderate share of common sense. What account, for example, could be given of Mr. Marshall's disquisition on the strap? Or of Gov. Helm's legal distinction between horse pistols and pop-guns? Or his conclusive argument that a "man of honor and a gentleman" would not commit a deliberate murder?

[2] We hope there is some mistake here in the reviewer's account of the reason of the decisions — which seems to be that because a prisoner was admitted to testify *against* himself, in the same *liberal spirit* he was held competent to testify in his own favor! Even we have a better opinion of Kentucky courts, than to credit this.

These decisions have been rendered by Circuit Courts it is true, as there has been no appeal in criminal cases until very recently, in Kentucky."

"It is possible, though we know of no case, that there has not been perfect uniformity with all our Circuit Courts upon this point; but it was shown in the argument of this case, that such had been the current of decisions, and Judge Kincheloe, when first deciding it, did it upon the authority of a decision of his predecessor."

We are not disposed to modify in any degree our opinion of this ruling. In our original article we extracted from the New York pamphlet the whole of what was there reported as having occurred upon this motion. The more detailed account of the arguments and decision, which is contained in the Cole report renders this ruling the more inexcusable.

We maintain that not only no lawyer but no student of very moderate reading in the law of evidence, can doubt that Robert J. Ward, Jr. was an incompetent witness by the rules of evidence as admitted and practised upon in any court recognizing the principles of the common law. Argument on this position is useless. No court out of Kentucky would now suffer the public time to be wasted in the discussion of a principle so well established, and so long and universally acceded to. We are perfectly willing to abide by the intelligent and unprejudiced judgment of the profession upon the correctness of this position. This rule of the common law was abundantly shown by Mr. Gibson, upon the argument, by citations from the reports of New York, New Jersey, Connecticut, Pennsylvania, Mississippi, North Carolina and Tennessee. To which might have been, and probably were added, many English cases, and one in Massachusetts directly to the point, viz.: *Commonwealth* v. *Marsh & Barton*, 10 Pick. 57.[1]

[1] As an instance, and probably an illustrative instance, of the reviewer's use of authority, we adduce his citation upon page 556, from 1 Greenleaf on Ev., § 379. The reviewer cites as follows: "It is a settled rule of evidence, that a *particeps criminis* is not on that account an incompetent witness, so long as he remains not convicted and sentenced for an infamous crime. The admission of accomplices as witnesses for the government, is justified by the necessity of the case. The usual course is to leave out of the indictment those who are to be called as witnesses; but it makes no difference as to the admissibility of an accomplice, whether he is indicted or not, *if he has not been put on his trial at the same time with his companions in crime. He is also a competent witness in their favor.*" There the quotation ends; but not so the text, which proceeds without the full stop, and reads thus: "He is also a competent witness in their favor; and if he is put on his trial at the same time with them, and there is only very slight evidence, if any at all, against him, the court may, and, as we have already seen, generally will, forthwith direct a

After this array of authorities, well might Mr. Gibson have exclaimed that "this was the first time in his experience that a motion was deliberately made to throw aside all the books, all authorities, all precedents, and trust to the mere personal opinion of the judge." (Cole Report, 52.)

Mr. Crittenden was no stranger to these authorities. In 1851, while Attorney General of the United States, he had himself argued the precise question before the Supreme Court in the case of the *United States* v. *Thomas Reids and Edward Clements*, 12 Howard, 361, and had succeeded in maintaining the *exclusion* of the witness.

The defendants in this case were jointly indicted for murder, committed by them on the high seas. By permission of the court below they were separately tried. Upon the trial of Reids, he proposed to call Clements as a witness in his favor. The court rejected the testimony, being of opinion that, as he was jointly indicted with the prisoner on trial, he was not a competent witness. Reids was found guilty.

At a subsequent day, he moved for a new trial upon two grounds, of which the first was, that the testimony of Clements was improperly excluded.

Chief Justice Taney, in delivering the opinion of the court, said, that "the difficulty in this question arose upon the construction of the Act of Congress of 1789. By a statute of Virginia, adopted in 1849, it is provided, 'that no person who is not jointly tried with the defendant, shall be incompetent to testify in any prosecution, by reason of interest in the subject matter thereof,'" and the court decided, undoubtedly with much assistance from the learning and ability of Mr. Crittenden, although his argument is not reported, that the rules of evidence in criminal cases in courts of the United States are the rules which were in force in the respective States when the Judiciary Act of 1789 was passed, and that a State Act, subsequently passed, would not *proprio vigore* alter those rules in the United States Courts, and, therefore, as Clements was an incompetent witness by the law of Virginia, at the time the Act of 1789 was passed, the State Act of 1849 could not render him competent.

The Judiciary Act was approved Sept. 24, 1789. Ken-

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separate verdict as to him, and, upon his acquittal, will admit him as a witness for the others." Mr. Greenleaf refers here to § 363, where he states, "But the matter is not considered as at an end, so as to render one defendant a competent witness for another, by anything short of a final judgment."

tucky was then a part of Virginia, and was erected into a Territory, Dec. 15, 1789, and admitted into the Union, June 1, 1792. Thence it follows, that the same law of evidence prevailed in Kentucky as prevailed in Virginia when the Judiciary Act was passed, and as still prevails there in the courts of the United States.

This common law rule of evidence is not shown by the arguments or decision in the Ward trial to have been altered or abrogated in Kentucky by any statute, or by the judgment of any court.

The Cole report gives the following synopsis of Mr. Crittenden's argument: "The defence were no strangers to these authorities. But it was a general rule, admitted and established by all the books, that if the indictments were separate, persons indicted for the same crime could be witnesses for each other. Now the fact that they were impleaded in the same indictment, made no difference in principle, and, if a person could be admitted in one, he ought in the other. The fact that their names were on the same piece of paper, instead of different pieces, ought not to exclude the witness. Such a construction would be a poor commentary on the common law. But there were higher and older authorities than the gentleman read, which were on the other side, and which, he contended, placed the question of admitting the witness on the simple ground of his moral competency, and not on a mere matter of being jointly indicted. He also referred to two cases, decided in this State, which supported his view, and said, "Here are two *American* authorities, yea, what is more, two *Kentucky* authorities, showing how *Kentuckians* had decided the point. There were some crimes which it required more than one person to commit, as a riot. In such cases, there was a community of guilt, and whether the criminals were indicted separately or jointly, they would not be witnesses for each other. But where the crime could be committed by one, this reason for excluding another impleaded for the same crime did not exist. He commented severely on the opinion of Lord Ellenborough, that the jury would be imposed on by an accomplice, and vindicated the ability of the jury to discriminate between truth and error."

This argument is not based on the peculiarities of the Kentucky law, but upon the general principles of the common law. The only part of it which can raise a doubt as to the rule of evidence in that State, is "the two *American*

authorities; yea, what is more, the two *Kentucky* authorities, showing how *Kentuckians* had decided this point."

To these citations Mr. Gibson opposed another, "not spoiled by being put in a book. He referred to the case of the two Kelleys, tried in Hart county, where the judge refused such a motion. There was also another objection to this admission. R. J. Ward, Jr. was indicted as an accessory, and his testimony might acquit the principal, and of course himself." p. 52.[1]

"Mr. Riley referred the court to a case in this county, where an accomplice had been admitted as evidence."

"The judge said the majority of Kentucky decisions was in favor of the admission of the witness. The weight of English decisions was against it, but they had been much modified by practice, and were originally founded on technicalities. The object of a trial was to ascertain the guilt or innocence of the prisoner, and all evidence not directly inadmissible, ought to be admitted. The practice was different in different States, but Kentucky decisions were in favor of the admission. The credibility of the witness must be left to the jury."

From this account of the proceedings it abundantly appears: 1st. That the common law rule of evidence, excluding Robert Ward as a witness, was fully sustained by citations from the English decisions and from those of many of the most respectable and learned tribunals in America. 2d. That the rules of the common law prevail in Kentucky, unless abrogated or altered by some statute or a judgment of a court. 3d. That no statute making the alteration was cited for the defence, whence it is safe to conclude that no such statute exists. 4th. That no decision controlling the judgment of inferior tribunals, has ever settled the point in that State; and 5th. Had the witness been excluded, the ruling could have been revised by the Court of Appeals, which the reviewer informs us is now established. But in this great trial, upon which the attention of the whole country was intently fixed, — where, as Mr. Gibson says, the audience were millions of freemen, who were watching with breathless interest its result, to sit in judgment on the verdict, a single judge of an inferior

1 In *Dougherty* v. *Dorsey*, 4 Bibb, 207, decided in 1815, by the Kentucky Court of Appeals, the marginal note is: "In a joint action of trespass against several, who sever in their defence, they cannot demand separate trials for the purpose of using a co-defendant as a witness. If no evidence is given against a defendant, he may be introduced as a witness."

tribunal, admitted the testimony of a witness unquestionably incompetent by the common law rule of evidence, as existing in Kentucky, who would testify directly in his own exculpation, not because the judge himself appeared to be convinced of the propriety of his admission, but because *a majority* out of four *nisi prius* decisions of inferior courts, of binding authority upon no one were in favor of it; thus settling for this important cause the gravest question of law occurring in it, upon the same principle as the moderator of a town meeting decides a proposition before the people.

There can be but one opinion out of Kentucky upon the character of this decision. It was a gross perversion of the law. No judge of an inferior tribunal, sitting in such an important cause, was justified in so deciding the point as to preclude the possibility of its revision by the Appellate Court.

This perversion of the law, and the unjustifiable use made of the testimony thus illegally introduced, we said, and still believe, may in part account for the general indignation felt and expressed, not in Louisville alone, but throughout the country, against the counsel for the defence, and more especially against Mr. Crittenden, as the most conspicuous and best known amongst them.

The only testimony in the case that Matt. Ward entered the school-room with his hands by his side, was that of Robert, who testified distinctly and exactly to that "most important fact."

Mr. Gibson says that Knight, Benedict, Pope and Crawford all swear that Ward had his right hand in his pocket when he entered the room, and kept it there "till he drew the pistol and fired." In the N. York report Mr. Crittenden is represented as saying, "It was the *general* evidence of the school-boys that Ward entered the house with his right hand in his pocket, and gesticulated with the fingers of his left." p. 144. In the Cole report, the statement by Mr. Crittenden is, "The boys *all* say that Matt. Ward came into the school-room with his hands in his pocket." p. 145. Here, then, were thirteen witnesses testifying to a prominent and startling fact, going very far towards the proof of express malice. Differing upon other facts, they agree without contradiction upon this fact. One witness against thirteen. One witness, with the strongest possible motive to testify untruly, against thirteen witnesses without the remotest personal inter-

est in the result of the trial. One witness, a boy of nineteen years of age, having, as it were, the reputation of his whole family dependent upon the statements he was about to make, not only standing between his brother and an ignominious fate, but testifying essentially in his own favor, whose manner upon the stand is described by Mr. Carpenter as "very much unlike that of a truthful witness," "ready, willing and swift, and, with a swaggering air, boasting that he had carried arms since he was fourteen years of age," (Cole Report, p. 70,) was to be sustained in his testimony, although directly and flatly contradicted by that of thirteen witnesses, "honest, manly, open-hearted boys, whose countenances alone would win them credit in a land of strangers — boys old enough to see, and understand, and remember facts, but too young to have been contaminated by intercourse with the world, too honest to speak falsehood, too guileless to conceal truth," ignorant of evil, innocent in their lives, and of the highest moral training that Louisville could afford.

The testimony of these boys must be destroyed, or, in all human probability, the prisoner would be convicted. To impeach their veracity was utterly a hopeless task. Although the reviewer asserts that there was no disposition to denounce all the scholars as perjured, as we "very illiberally insinuated," it was not, as the counsel for the defence all unite in showing,[1] until after the strenuous attempts

[1] Mr. Carpenter says: "Efforts were made by the learned counsel to impeach indirectly these young men, by asking them: Did you not tell Dr. Caspari and others that Butler struck Ward first? But when the doctors and others referred to came upon the stand, a contradiction was not even attempted." Cole Report, p. 63.—Again: "And now must all these young men of Louisville be swept down, must their reputations be blasted, that this prisoner may live and flourish, and upon such testimony? But they disavow such an attempt. They have manifested their willingness, but are afraid to strike the blow—they do it by innuendo." Id. 72. Mr. Gibson says: "Never, perhaps, did attempts to impeach witnesses encounter more signal failure. So hopelessly has it failed, that counsel with a boldness that, in a better cause, would be worthy of admiration, now deny that they have attempted to impeach them at all. I will never complain of attempts to impeach a witness where any ground exists to base the attempt upon. But to attempt to confuse a witness by intimating to him that he has told a different story out of court, and asking him if he has not told this or that man such and such a story, when the counsel know that they have no evidence that he has, would be a most unfair course towards a *man* of good character. It certainly acquires no additional merit from being practised on *boys*." Id. 105. Mr. Allen says: "Gov. Crittenden tells you he believes in blood. So do I; and I know these young men—I know their antecedents and their ancestry—I know they are of all grades in life; but many of their fathers hold high places, and are not only distinguished for rare abilities, but for possessing all the social and manly virtues. Do you believe the children of such parents came here to perjure themselves? Though the gentlemen admit their universal good character, they stab that character a moment after, by stating that they consider them boys who can be taught to believe and testify to what is false." (N. Y. Rep. 162.) Probably the reviewer, in the "hurry and fervor of argumentation," suffered his understanding to be the dupe of his imagination.

made to destroy their credit for veracity had signally failed, that the alternative course was adopted of attacking only the correctness of their testimony. Then, indeed, all intention of impeaching their veracity was carefully disclaimed. Mr. Crittenden would not even allow that he has represented them as *simple*, but only as "*misled.*"

The course finally adopted was to impeach, not the veracity of witnesses, but only the correctness of their testimony; to contend that the whole of it was to be disregarded in favor of Robert J. Ward, Jr. This "is the only testimony which has brought order out of disorder — given the only connected and reasonable account of the whole affair — a consistent history of the events that transpired — natural in their course and leading directly to the results that actually occurred." (N. York Rep. p. 135.) This, we say, was contending that Robert Ward was the "only witness worthy of belief," and although the reviewer excepts to the phrase and views it as evidence of the "prejudice which dictated our whole article," such special pleading is rather captious than convincing.

Although Mr. Crittenden chose to represent these thirteen witnesses as a mere "set of boys" from eleven to eighteen years of age, while, in fact, the youngest was thirteen and the eldest twenty, or one year older than his own immaculate witness, and two others were but a single year younger, we did not object to the use he made of this witness's evidence in exalting it over that of the boys. We made no complaint of that extraordinary course. On the contrary, we fully admitted that "it was fair enough thus to comment upon testimony in some respects undeniably conflicting." We are not disposed to deny, on the contrary readily admit, that it is not only the right, but the imperative duty, of counsel in any cause, civil or criminal, to "make becoming and proper comments upon testimony," "however pure may the source whence such testimony flowed." It is precisely because the comments made were not becoming and proper, but, in our estimation, highly unbecoming and improper in any advocate, and especially in an advocate of Mr. Crittenden's high character and great personal influence, that they "called forth" what the reviewer is pleased to term our "most unqualified and bitterest denunciation." It was the gross, unjustifiable and slanderous attack upon the character of Mr. Sturgus, growing out of the theory of the defence that the boys were not to be believed, and that Robert Ward

was; it was this use of his testimony which we pronounced and still consider utterly derogatory to the dignity of the profession, because it could not have stood for one moment before an intelligent and honest jury, unless by the aid of this atrocious attack upon Sturgus.

This "denunciation" we applied to all the counsel for the defence. That our readers might judge for themselves of the true character of the assault, we quoted in full the passages where it occurred. Each reader, therefore, could judge for himself whether our statement of it was correct, or, as the reviewer chooses to say, was "a false representation of its character." We are content to place his explanation side by side with the arguments of the counsel, and to abide by the judgment of any high-minded, unprejudiced person within or without the limits of Kentucky, whether, when Mr. Crittenden reminds the jury "that these boys, since the occurrence of the principal fact they were investigating, have been the scholars, and *under the tuition and training of Mr. Sturgus;* when he declares that the jury "will see the *impossibility* of a fair and faithful narration of the event from them *under such circumstances;*" when he says, "this man, *they not knowing it*, by a word *properly* thrown in," not as the reviewer quotes, "by a word thrown in," but by a word *properly* thrown in, "and a statement *repeated until they were familiar with it and received it without question*, may have exercised great influence and control over the *feelings and recollection* of these boys;" when he asks, "is it not probable that, *instigated by his enmity to the Wards, he advised Butler to refuse all explanation and investigation;*" when he asserts that Butler was prompted to this course "*by the sinister, subterrancan motives of another man who desired to minister to his own anger and ill-feeling;*" that "it was not like Butler to answer haughtily, 'I am not to be interrogated,' but that it *was like Sturgus;*" when he further asserts that "a strong imagination has supplied the place of a strong memory, — the boys have been *trained, influenced unconsciously, — Sturgus was sore toward the Ward family;*" when he solemnly asseverates that Sturgus was the enemy of Ward, and was "*by that enmity, as I verily believe, the cause of the unfortunate event which occurred*," we ask any man to say whether the counsel did not argue "that Sturgus, moved by demoniac hatred towards the whole Ward family, first advised Butler to refuse the explanation, and then instilled

into the minds of his pupils, by artful insinuation and cunningly contrived observations, the belief that the fact they testified to was true, he himself all the while knowing it to be false?"

Will any man believe, that if such feelings rankled in his breast, if he were urged by the impulse of such cowardly and savage revenge, Sturgus *could*, as the reviewer intimates, *honestly* have exercised the influence attributed to him? Did not Mr. Crittenden "describe Sturgus as the *dark mover behind this scene of iniquity.*" Did he only "*philosophize on the influence*" which Sturgus could exert by "a word thrown in or a statement repeated," when he told the jury "you well understand how this man, they not knowing it, by a word PROPERLY *thrown* in or a statement repeated," would control their *feelings* and recollection? Is it not an inevitable conclusion, was it not the conclusion which Mr. Crittenden intended the jury to draw, that "there *was* moral depravity in Sturgus doing this," when he solemnly asserted it to be his belief, that the enmity of Sturgus was the cause of Butler's murder, which he mildly described as the "unfortunate event which occurred." Will any one, *can* any one believe with this reviewer, that, with the motives attributed to him, Sturgus did or could exert his power over these artless boys "*honestly*," or "under the full conviction that he was in no way departing from the truth of the case, and thrown in words and repeated statements which *he believed to be true?*"

When, further, it shall be remembered, that throughout this case, there was no evidence that Sturgus entertained the slightest enmity towards any member of the Ward family, (incredible as this may appear, it is the testimony of both reports) that the only semblance of foundation for the gross assumption upon which the attack was based, is the solitary unsupported statement of Mrs. Ward, "*you know Mr. Sturgus is your enemy*," made to the prisoner in a moment of great agitation, just before he started on his murderous errand — that testimony to prove this enmity, was offered by Mr. Crittenden, and rejected by the court — that Sturgus was not summoned to testify against Matt. Ward, because he knew nothing of the killing,[1] but only against Robert, who was not on trial,

[1] The testimony of Mr. Sturgus on the "examining trial" was as follows: "He was in the recitation room; saw the boys congregating at the glass door of the room which looked into the school-room. He called the boys back, and just

and before the prosecution knew that there would be a severance in the trial — that this explanation was made by Mr. Gibson before Mr. Crittenden addressed the jury, — we ask, when these things are considered, if any right-minded man will say that the attack upon Mr. Sturgus was not atrocious, inconsistent with the character of a high-minded advocate, derogatory to the dignity of the bar, and repulsive to the sense of justice inherent in every honest heart?

If the doctrine of Lord Brougham, "that an advocate, by the sacred duty which he owes to his client, knows, in the discharge of that office, but one person in the world, and none other — to save that client by all expedient means — to protect that client at all hazards and costs to all others, and among all others to himself — is the highest and most unquestioned of his duties; and he *must not regard the alarm, the suffering, the torment, the destruction he may bring upon any other*," — if this be received as the morality of the profession, if a lawyer of national reputation and commanding personal character, who has been accepted by the world as a representative of American genius, American education, and American morals — if it be right for such a man upon any occasion, to descend from his elevated station into a mere combatant for forensic triumph, to oppose, in the earnestness of his struggle, the principles of law, which, as the highest legal officer of the nation, he had before successfully maintained, and, without evidence or apology, to put forth all his strength to destroy the character of an innocent and unoffending man; then, perhaps, Mr. Crittenden's course on this trial may be defended, and his efforts add new lustre to his fame. But if "one should bear in mind the agony which he may be inflicting in every word that is uttered upon a person of spotless integrity, and of the highest delicacy of feeling, whose conduct one may have totally misunderstand, of whose real motives one is altogether ignorant," and therefore should not "recklessly endeavor to expose such a person to the ridicule, scorn, and hatred of his friends and the public, and inflict upon his

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then he heard a pistol fire, and stepping into the room, saw Mr. Butler stagger and fall, and saw some one, supposed to be Robert Ward, flourishing a large knife. He turned to Mr. Butler, who fell on a settee, and he was fearful he would die before a physician could be called, and his nearest way was through a window, which stood open, and he went out for Dr. Caspari. He further stated that Mr. Butler had whipped William Ward, a small lad, one of his pupils, the morning previous. (Cole Report, pp. 5, 6.)

character injury *irreparable*,"[1] — then before the calm common sense of the people, over which sophistry is powerless, in that moral judgment of honest men, which casuistry cannot deceive, Mr. Crittenden will receive, as he has already received, stern and uncompromising censure.

In speculating upon the causes which might have produced the lamentable verdict in this trial, we suggested that one cause might be, the "entire doubt in which the jury was left as to the principles of law applicable to the facts." Propositions in our opinion extraordinary, and we are inclined to believe, equally so in the opinion of any lawyer out of, and of most lawyers in Kentucky, were advanced as law by the counsel for the defence. Not having then seen the arguments for the prosecution, except that of Mr. Allen, upon perusing the reports of them as contained in the Cole pamphlet, we perceive that we did injustice to the great ability displayed in those masterly efforts, when we observed that the propositions of the defence were denied by the government, and the true doctrines expounded with no great force of illustration, but still with general distinctness." On the contrary, the correct law was most ably urged by all the counsel for the government, and especially by Mr. Gibson who applied it to the facts with consummate skill and clearness. This correction, which we take great pleasurein making, only adds force to our remark that, "left in this position, the jury must rely upon the court to dissipate the fog or acquit the prisoner, because they doubted on the law." We added, that "in this great Kentucky cause, the presiding judge made no charge worthy of the name, and did nothing to remove the mystification into which the minds of the jury were inextricably thrown."

The reviewer thus comments upon these passages of our article: "You assume that it was the duty of the judge to give a charge to the jury, and then contrast what was said with a charge delivered by the excellent Chief Justice of your own Supreme Court, occupying more than two hours. When you learn that a judge is not allowed to charge a jury, either in a *civil or criminal* case, in Kentucky, you will doubtless be ready to acknowledge the gross, and we may add, the 'atrocious' injustice you have done Judge Kincheloe."

In support of the position that a judge *is not allowed* to

[1] Warren's Law Studies, pp. 867, 868. The whole of paragraph No. I, c. 19, is commended to the reviewer's careful study.

charge a jury, the reviewer's advances sundry arguments, apparently sustained by various citations, and then winds up with the following emphatic declaration: "From this brief view of what is considered the right and duty of a judge in Kentucky, you cannot fail to perceive how gross and outrageous has been the injustice done to one of the purest judges, and best men, who ever adorned the judicial station."

We profess to know little about the peculiarities of Kentucky law, beyond what is contained in the article before us, and the two reports of the trial. Were we not credibly informed that the review was written by a lawyer, its character would rather incline us to the opposite belief. But we accept the statements made by the reviewer as evidence of what is Kentucky law upon this point. We cannot, however, admit this evidence as conclusive, and must still be permitted to doubt, whether the presiding judge performed his duty upon the trial in suffering the case to go to the jury with no attempt to explain the principles of law applicable to it, and without even an authoritative definition of malice.

Our reasons for not accepting, unquestioned, the reviewer's *ex cathedra* exposition of Kentucky law, are the following:

1st. We find Mr. Gibson, a lawyer of that State, proved by his argument in the case, to possess eminent abilities, when about to lay down "the uncontrovertible principles of law upon which," as he conceived, "this case must rest," adds: "*I lay down these principles under the eye of the Court.*" What did Mr. Gibson mean by this assertion, if the judge had no right, if it were not his duty, to correct the law thus stated, if it were wrong?

2d. We find the prosecuting attorney, who is presumed to be an able lawyer from the official station which he fills, and who, as far as we are informed, is acknowledged in Kentucky to be such, saying to the jury in one part of his closing argument, "You are sworn to try this case, and to form your verdict according to the written laws of your country, *expounded by this Court* and applied to the testimony by your own understanding"—and in another part, "I believe you fully understand the law which applies, and if *I have misstated it on any point, I am sure that his Honor will not neglect to correct it in his charge.*"

3d. The judge himself contradicts the reviewer, 1st. By

his own practice on the trial, inasmuch as he did deliver not one only but two charges,— one at the commencement of the trial, and the other at the end of it. 2d. In the first part of his last address, he not only lays no stress on the asserted prohibition of the law against judicial charges, but "conceives it to be his *duty* to direct" the jury's "attention to the issues made in the progress of the trial," adding, as a reason why he does not discuss "the various principles of law applicable, either directly or indirectly, to the facts proved in the case," not that he is forbidden by law to do so — not for the anti-conservative, jacobinical reason advanced by Mr. Crittenden, that "the judge would lay down the law like a problem in Euclid, and by taking a scrap of law here and a scrap there, might sentence a man to death on a mere technicality," while "the jury pass over all mere technicalities, and reach the substance of the case," (Cole Report, p. 135,) but because "the usual practice, in criminal cases in this district, of reading and discussing the law before the jury, having been adopted *in this case, relieves the Court of the necessity*, and to *some extent* renders it improper" to do so.

The only escape from the conclusion deducible from this high authority, that it was the right of the judge to charge the jury on the law, if he chose to do so, is under the shelter of the subterfuge, "that no judge in Kentucky has ever attempted to charge a jury in a criminal case, either upon the law or the facts, "in *the sense in which a charge is here understood.*"

We do not deny that the paragraphs quoted from our article may be construed as containing an implied censure upon the presiding judge, against whose *uprightness and integrity* we never intended to make, and here emphatically disclaim the intention of making, the slightest insinuation. Whether, however, this implied censure deserves the epithets which the reviewer has chosen to apply to it, we leave to others to decide. The remarks, excepted to, were not made for the purpose of censure, but as offering the most charitable apology which occurred to us, for the verdict. Whether the court had or had not the right to charge the jury, "in the sense here intended," or in any other sense, whether it were or were not his duty to do so, the *fact* remains true, that no sufficient charge was given; that nothing was said to instruct the jury upon the meaning of malice, which, "expressed or implied, is an essential ingre-

dient of this crime." If the judge be in truth prohibited by law from charging the jury either on the law or the facts in every sense — then, although he disregarded the law, he is obnoxious to no censure from us. If, on the contrary, as we are more inclined to believe, it was his duty to expound the law, and to afford the jury some rational and sensible basis upon which to investigate the facts, if not in the form of a technical charge, at least in some other form peculiar to Kentucky — then we can only say that a more striking exhibition of judicial inefficiency than the charge delivered, was never before made in a court professing to administer justice. In either case, it is equally true that the jury received no sufficient instruction, and may have acquitted the prisoner from the reasonable doubts which they must have entertained on the law, without rendering themselves liable to the charge of perjury which has been freely advanced against them.[1]

Before leaving this subject, we must advert to the opening address to the jury, which was as follows:

"The defendant, Matt. F. Ward, has been arraigned, and has entered a plea of not guilty, throwing himself upon God and his country for trial. If you find him guilty, you will say so, and no more. If you find him not guilty, you will say so, and no more. *In case the killing shall be proved to have been done under the influence of passion, you can find the defendant guilty of manslaughter*, and will say so. Should it be proved that the act was done in self-defence, it is not an act of voluntary homicide, and you will find him not guilty."

We know not if this opening address from the court is required by the law or practice in Kentucky courts, but one feature of it is certainly remarkable. The indictment charges the prisoner with *wilful murder* in the first degree. But, in this address, the judge makes no allusion to murder. He directs the attention of the jury only to manslaughter, and voluntary homicide. This is a striking peculiarity in the administration of "Kentucky justice," as exhibited on this trial. Before any evidence had been heard, immediately after reading the indictment, the court not only omits to give the slightest intimation of what constitutes murder, not even pronouncing the word, but pre-occupies the minds of the jury, by announcing as law, the unqualified, and

[1] It has been stated that several of them have been indicted for perjury as jurors in this case.

therefore monstrous, proposition, that in case the *killing shall be proved to have been done under the influence of passion*, they could find the defendant guilty of manslaughter, and that if done in self-defence, it was not an act of voluntary homicide. We do not intimate that the judge intended to bias the minds of the jury, but only assert that such would not fail to be the effect of his opening address.

The standing of the parties committing this murder, the scene and boldness of its perpetration, and the character of its victim, attracted to the trial a greater share of public attention, than is usually bestowed on the local administration of criminal law. When it became known that Mr. Crittenden deemed the case so important as to volunteer in the defence, it assumed something of a national consequence. But no one doubted that in a State like Kentucky, public justice would be vindicated, and that, whatever the result, it would accord with the proof.

When the verdict was announced, the whole country was taken by surprise. The general astonishment was forcibly expressed in almost every newspaper which alluded to the trial. There were those, however, who suspended their judgment till an authentic account of the evidence and proceedings should afford them the means of a correct opinion. The New York report of the trial appeared, with the reputation of having been prepared by the friends of the prisoner, and was stamped with conclusive authority by the public appeal made to it by the defendant himself.

We first read the argument of Mr. Crittenden—attracted to it not less by his fame as an advocate, than by the accounts which had been given of the extraordinary positions he had assumed. We find him rejoicing, not that the prisoner was in a house of justice merely, but in a "house of Kentucky justice." "The accused is before you in a house of Kentucky justice, and all vengeance must cease to pursue him at this threshold." After reading the evidence as contained in this report, no *impartial* person could hesitate to say that the verdict was infamous; that there was not, from the beginning to the end of the case, a passably plausible excuse set forth for it. There never was a murder committed in any community for which so little could be said in extenuation, or which was so deplorably deficient in respectable or honest grounds of defence. It stands forth on the pages of this report in all its naked and hideous

deformity of a deliberately intended, preconceived, brutal assassination, without the pretext of even temporary passion.

But this shocking verdict was not the only illustration of the justice of Kentucky contained in that report. There are four other verdicts of similar atrocity, which, because the parties were in the humbler walks of life, attracted no attention until this trial exposed them to the public gaze. We mean the cases of Stout, Coon, Owen and Wilkinson, cited with approbation by Mr. Wolfe, in his argument, pp. 111, 112.

From these five cases Mr. Crittenden's phrase received a more than common significance, and we used it accordingly.

But Kentucky is alive to the disgrace she has suffered. We see in the honest and manly indignation expressed in the resolutions we have quoted; in the deserved and universal execration with which her *people* have received the verdict, which, however it may suit the partisans of the acquitted criminal to characterize as the emanation of malignity and prejudice, springs from the noblest impulses of the human heart, proof that the State which has produced the greatest statesman of the age—a statesman who has done more than any other man of modern times to elevate the character of the country—will yet redeem her reputation, and render "Kentucky justice" henceforth an honor, instead of "a by-word and reproach."

NOTES TO LEADING CRIMINAL CASES.

Commonwealth *v.* Rogers.*

Insanity — Delusion — Uncontrollable Impulse — Evidence.

A jury is authorized to find that a party, who is indicted, was insane at the time of the alleged offence, if the preponderance of the evidence is in favor of his insanity.

The jury, after being in consultation several hours, came into court and asked instructions upon these two questions:

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* 7 Metcalf, 500. See Feb. Law Rep. We give here only the last marginal note, and the closing portion of this case.

"Must the jury be satisfied, beyond a doubt, of the insanity of the prisoner, to entitle him to an acquittal? And what degree of insanity will amount to a justification of the offence?"

In answer to the first of these questions, the chief justice repeated his former remarks on the same point, and added, that if the preponderance of the evidence was in favor of the insanity of the prisoner, the jury would be authorized to find him insane. In answer to the second question, the chief justice added nothing to the instructions which he had previously given.

The jury afterwards returned a verdict of "not guilty, by reason of insanity."

S. D. Parker, for the Commonwealth.

G. T. Bigelow and *G. Bemis*, for the defendant.

In our February number we spoke of two well-recognized tests of insanity, viz: inability to distinguish between right and wrong, and a delusion as to existing facts, which, if true, would justify the act alleged. But are these two tests always sufficient? Are there no crimes committed which may be excused, although not done under the influence of an insane delusion as to existing facts, or with an incapacity of knowing right from wrong? These two tests essentially apply to the *intellect*. But is man composed entirely of intellect? Has he not emotions, passions, propensities, and above all, a personal *will*, which may become deranged? Are there not other faculties and powers essential to an accountable being, besides those of mere intellect and sense? And are not these the distinguishing characteristics of *man* above the lower orders of animals?—Is not the agency and coöperation of the will, that self-originating and self-controlling power, belonging to man alone, necessary to give *character* to any act, and render it censurable or praiseworthy? If that will, therefore, be truly in subjection to a higher or a lower power than itself: if it be not free, uncontrolled, and without restraint, is its possessor chargeable with *guilt* for its operations? Is not therefore, the power of *choosing* right from wrong as essential to legal responsibility, as the mere capacity of *distinguishing* between the two?

If a person's power of controlling his thoughts, words and actions, is really destroyed or suspended, from the effect of a disordered or diseased mind, why should he be responsible for his acts, although his intellect may not be so far impaired that it cannot discern his conduct to be contrary to the law of God and man? If in ethics free will is essential to moral accountability, why should not the power of control over one's actions be necessary to render man amenable to human punishment? Any act, to be criminal, should be voluntary. *Actus non facit reum, nisi mens sit rea.* Why is the wife who commits a misdemeanor in the presence and by command of her husband, entirely excused in the eye of the law?—Because her will is overruled and controlled by his, and he is, in law, the only guilty party. Why is the infant of tender years irresponsible for his acts? Because his mental powers are so weak and defective, that he has no criminal will or intent. Why is homicide, caused by pure accident, no crime? Because the voluntary will, the essence of all criminality, is wanting. For this reason it is, that if one commit a felony by means of an

innocent agent, the principal, and not the agent, is alone criminally responsible. *Regina* v. *Bleasdale*, 2 Carrington & Kirwan, 765.

It must be confessed, however, that this species of insanity, *moral insanity*, as it has been called, or *lesion* of the will, as medical men term it, (*lésion de volonté* of the continental writers) coëxisting with *intellectual* sanity, has not received the sanction of modern English judges. Indeed, it has been emphatically repudiated, as our readers have already seen. And if by moral insanity is to be understood only a perversion or disordered state of the affections or moral powers of the mind, it cannot be too soon discarded as affording any shield from punishment for crime. It would be as just and as safe to make moral *depravity* a protection for crime, as to extend the defence of insanity to any such untenable and pernicious grounds.

But may there not be a *moral* or *homicidal insanity*, consisting of an *irresistible* inclination to kill, or commit some other offence, some unseen pressure on the mind, drawing it to consequences which it sees *but cannot avoid*, and placing it under a coercion, which, while its results are clearly perceived, it is incapable of resisting? Such was the opinion and language of Chief Justice Gibson, of Pennsylvania, in the case of *Commonwealth* v. *Mosler*, 4 Barr, 267, (1846.) It is not alone the *sane* who may say, "I see the right and yet the wrong pursue." On what other ground was the servant maid, in *Regina* v. *Brixey*, *ante*, entitled to an acquittal? She had capacity to know, and did know, she was doing wrong. She knew the nature of the act she was doing, *and its penalty*. She was even curious to know which of the alternative penalties was to be visited upon her head. Tried by the test of knowledge alone, she was responsible.

Neither would the second test, before spoken of, exempt her; for there was no evidence she was laboring under any *delusion of fact*, which, if true, would have been a justification, as in *Commonwealth* v. *Rogers*. Unless, therefore, some other species of insanity, or manifestation of that disease, is recognized, what shall be done with her case, and other similar cases? On what other ground is the parent, who, without cause, suddenly murders an innocent and beloved child, sometimes held excusable? Accountability for crime pre-supposes a criminal *intent*, and *that* requires a will subject to control. For this reason, a homicide committed under the influence of *uncontrollable impulse*, has been declared to be no murder. But this must be confessed to be a *most dangerous doctrine*, and one to be recognized only in the clearest cases. To establish such a justification, said Chief Justice Gibson, in 4 Barr, 267, in any particular case, it is necessary to show, by clear proofs, its contemporaneous existence evinced by present circumstances, or the existence of an habitual tendency, developed in previous cases, becoming in itself a *second nature*.

How difficult must it be satisfactorily to determine whether an act charged as criminal was the result of a truly irresistible impulse, overruling a diseased and disordered mind, or was only the outbreak of ungoverned, and *therefore* ungovernable passions. Yet the one is a sufficient excuse, and the other no palliation for deeds of violence and wrong.

While, on the one hand, there is too much foundation for the remark of Mr. Baron Gurney, on trial of the case of *Rex* v. *Reynolds*, that the "defence of insanity had lately grown to a fearful height, and the security of the public requires that it should be closely watched," may not a portion of the distrust of eminent judges in that species of insanity exhibiting itself in an *irresistible impulse*, be founded rather in the extreme difficulty of satisfactorily determining whether, in any given case, the impulse under which the act was done, was or was not irresistible, than in the plea itself *when entirely proved*. That it is almost beyond the reach of man's wisdom to know whether a prisoner was or was not not able to control and

subdue the power which was urging him on to the commission of crime, is unquestionably true; nevertheless, the difficulty of determining *any* fact sought for, in a judicial investigation, ought not to affect the legal consequence of that fact, *when once established.* Besides, will not the same objection apply, and with equal force, to the other test of insanity, viz.: capacity of knowing right from wrong? How much easier is it for human imperfection to determine that a prisoner had not sufficient capacity to know right from wrong, than to conclude he had not sufficient power of will to control his impulses? The difficulty is not in the *test;* it is inherent in the nature of the subject. What finite mind can fathom the depths, or fully comprehend the workings of a mind laboring under this most mysterious and subtle disease? "It is hid from the eyes of all living, and kept close from the fowls of the air."

Although the doctrine of *irresistible impulse*, or moral insanity, is well established among medical writers, and gentlemen experienced in the care of lunatics, it has not yet attained a fixed and decisive character in judicial trials. It seems to have been recognized by Chief Justice SHAW, in our leading case, when he says, "Monomonia may operate as an excuse for a criminal act, when it indicates, to an experienced person, that the mind is in a diseased state; that the known tendency of that diseased state is to break out into sudden paroxysms of violence, venting itself in homicide or other violent acts towards friend or foe indiscriminately; so that, although there were no previous indications of violence, yet the subsequent act, connecting itself with the previous symptoms and indications, will enable an experienced person to say that the outbreak was of such a character that, for the time being, *it must have overborne memory and reason;* that the act was the result of the disease, and not of a mind capable of choosing; in short, *that it was the result of uncontrollable impulse*, and not of a person acted upon by motives, and governed by the will."

Judge EDMONDS, on the trial of *Kleim* for murder, in New York city, in 1844, said to the jury:

"If some controlling disease was, in truth, the acting power within him, *which he could not resist*, or if he had not sufficient use of his reason to control the passions which prompted him, he is not responsible. But it must be an absolute dispossession of the free and natural agency of the mind. It must be borne in mind that the *moral* as well as intellectual faculties may be so disordered by the disease, as to deprive the mind *of its controlling and directing power.* In order to establish crime, a man must have memory and intelligence to know that the act he is about to commit is wrong; to remember and understand, that if he commit the act, he will be subject to punishment; and reason and *will* to enable him to compare and *choose* between the supposed advantage or gratification to be obtained by the criminal act, and the immunity from punishment which he will secure by abstaining from it. If, on the other hand, he have not intelligence enough to have a criminal intent and purpose, and if his *moral* or intellectual powers are either so deficient that he has not sufficient *will, conscience, or controlling mental power;* or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent." (2 American Journal of Insanity, January, 1846, p. 261.) Substantially the same principles were recognized by WHITING, J., on the trial of *Freeman*, 4 Denio, 29. (Trial of Freeman, pamphlet.)

It may be that there is not yet a concurrence by the English judges in the species of insanity last alluded to, but that may be in part owing to that extreme regard for life and property ever indicated in the decisions and opinions of the English bench.

The conclusion to which we come on this branch of our subject is, there-

fore, that it is impossible to give a complete definition of insanity, or one that is universally applicable, or to say what it is, and what it is not; it may be described and explained, but not defined. We think, however, that the state of the authorities will justify these three propositions, as already established:

First. A person is not criminally responsible, if, at the time he committed the act, he had not sufficient capacity to know whether his act was right or wrong, or, more accurately, to know that it was contrary to the law of the land. Thus far, all the authorities agree.

Second. He is not responsible, if the act was done under a fixed bona fide delusion, that certain facts existed, which were wholly imaginary, but which, if true, would have been a good defence. Fourth Answer of the judges in McNaughten's case, *ante*. *Commonwealth* v. *Rogers*. *Rex* v. *Ayre*, 5 Carr. & Payne, 168. *People* v. *Pine*, 2 Barbour, 571. *Hadfield's case*. *Martin's case*.

Third. He is not responsible, if the act was done under some irresistible impulse, the result of a diseased and disordered mind, which overpowered his will, taking away his power of control, and there was no criminal intent. *Roberts* v. *The State*, 3 Kelly, 310. *Regina* v. *Touchett*. *Regina* v. *Brixey*. *Regina* v. *McNaughten*. *Regina* v. *Oxford*. *Kleim case*.

II. *Of the evidence admissible on the issue of insanity, and especially the opinions of witnesses therein:*

It seems to be generally conceded that a *higher degree* of insanity must be shown in criminal cases, in order to absolve a party from guilt, than in civil actions to discharge him from the obligations of his contracts. 2 Greenleaf, Ev. § 372. But it is conceived that in both cases the same evidence is *admissible*, and that what may be received in one, may be received in the other, and what must be rejected in one, ought to be rejected in the other. See *Watson's case*, 2 Starkie, 155. *Murphy's case*, 6 C. & P. 297. And although the precise question always is, whether the accused was insane at the *very time he committed the act*, yet evidence of acts, declarations and conduct both *before* and *after* that time, showing the insane state of mind, are admissible as bearing upon the exact point in controversy. *Peaslee* v. *Robbins*, 3 Metcalf, 164, (1841.) *Norwood* v. *Marrow*, 4 Dev. & Batt. 442, (1839.) *Vance* v. *Commonwealth*, 2 Virginia cases 132, (1818.) *Grant* v. *Thompson*, 4 Conn. 203, (1812.) *Dickinson* v. *Barber*, 9 Mass. 225, (1812.) *United States* v. *Sharp*, 1 Peters, C. C. 118, (1815.) *Bryant* v. *Jackson*, 6 Humphreys, 199, (1845.) *McAllister* v. *The State*, 17 Alabama, 434, (1850.) *McLean* v. *The State*, 16 Alabama, 672, (1849.) *Kinne* v. *Kinne*, 9 Conn. 102, (1831.) And where general insanity is proved to have existed *prior* to the commission of the crime, its continuance up to that time will be presumed, and the prosecution must then show the occurrence of a lucid interval. *Cartwright* v. *Cartwright*, 1 Phillimore, 100, (1793.) *Jackson* v. *Van Dusen* 5 Johnson, 144. *Armstrong* v. *Tinnons*, 3 Harrington, 342. *Jackson* v. *King*, 4 Cowen, 207, (1825.) *State* v. *Spencer*, 1 Zabriskie, 196, (1846.) *Hoge* v. *Fisher*, 1 Peters, C. C. 163, (1818.) So of *partial* insanity, or insanity only on particular subjects, — *Thornton* v. *Appleton*, 29 Maine, 298 — unless such prior insanity was caused by some violent disease, in which case the presumption of continuance does not apply; for *cessante ratione, cessat ipsa lex*. *Hix* v. *Whitmore*, 4 Metcalf, 545, (1842.) For to authorize the presumption of continuance, the insanity proved ought to be of an *habitual* and not merely an *occasional* character. *Lewis* v. *Baird*, 3 McLean, 56, (1842.) The rules of evidence, therefore, being the same in civil and criminal cases, evidence of *hereditary* insanity is admissible in

both cases. *Regina* v. *Tucket*, 1 Cox, C. C. 103, (1844.) *Regina* v. *Oxford*, 9 Car. & Payne, 525, (1840.) But medical books containing the opinions of medical gentlemen of even the highest authority are not, on the *recent* authorities, admissible in either case. *Commonwealth* v. *Wilson*, 1 Gray, 337, (1854.) *Collier* v. *Simpson*, 5 Carrington & Payne, 74, (1831.) *Cocks* v. *Purday*, 2 Carr. & Kirwan, 270, (1846.) *Carter* v. *The State*, 2 Carter, 617, (1851.) And the spirit of the rule forbids the reading of such books to the jury. *Regina* v. *Cranch*, 1 Cox, C. C. 94, (1844.) But that may be rather a matter of discretion with the court. *Luning* v. *The State*, 1 Chandler, 178, (1849.)

And this brings us to the main question on this branch of our subject, viz.: *When are the opinions of physicians and others competent evidence on the issue of insanity?*

That professional gentlemen, who are acquainted with the disease of insanity, *and who have personally examined the party* to whom insanity is attributed, may give their opinion upon the direct question whether he was or was not insane, is beyond controversy. Such evidence comes strictly within a familiar principle of law, permitting the opinions of experts to go directly to the jury. But our leading case goes much farther than this, and permits persons conversant with insanity, and who have heard the testimony adduced at the trial, *but who have never had any personal knowledge of the party*, to give their opinion upon the sanity or insanity of the prisoner, supposing the facts detailed at the trial to be true. The grounds of the admissibility of such evidence are exceedingly well stated in the lucid charge of Chief Justice SHAW, in our leading case, and the propriety of the rule has been frequently recognized and acted upon in other American courts. *McAllister* v. *The State*, 17 Alabama, 434, (1850.) *Clark* v. *The State*, 12 Ohio, 483, (1843.) *Potts* v. *House*, 6 Georgia, 324, (1849.) And such a question has frequently been permitted in England, sometimes with and sometimes without objection. See *Rex* v. *Searle*, 1 Moody & Robinson, 75, (1831,) PARK, J. *Rex* v. *Offord*, 5 Carrington & Payne, 168, (1831.) *McNaughten's case*, 10 Clark & Finnelly, 201, (1843.)

And MAULE, J., in answer to the questions by the House of Lords, acquiesced in the propriety of such questions, and considered the position established. But all the other judges declared a contrary opinion. The question put to them was: "Can a medical man, conversant with the disease of insanity, *who never saw the prisoner previously to the trial*, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was laboring under any and what delusion at the time." And their reply was in these words: "We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and questions are not mere questions upon a matter of science, in which case such evidence is admissible. But, where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the questions to be put in that general form, though the same cannot be insisted on as a matter of right."

If, therefore, the question could not be put *as a matter of right*, it could not be put at all, if objected to by the opposite party, which is equivalent to disallowing it altogether. And Lord Brougham, in the debate on this

case in the House of Lords, declared, that "if the House would look at what was laid down by Lord Hardwicke, then sitting as Lord High Steward at the trial of Earl Ferrers, in 1760, when that very kind of evidence was tendered, where those very questions were put to the witnesses, and when Lord Camden, then Attorney General Pratt, objected to that evidence and those questions, they would find that Lord Hardwicke said that the question must not be put — that it was not legal evidence; and his Lordship said, you must not ask a witness whether the facts sworn to by other witnesses preceding them amount to a proof of insanity, you shall state the facts to the witnesses—men of skill in their profession—and you shall ask if such a fact is an indication of insanity or not — you shall ask them, upon their experience, what is an indication of insanity — you shall draw from them what amount of symptoms constitute insanity—but you shall not remove the witness from the witness-box into the jury-box, be he a medical man of the most unquestionable skill, the most practiced in that most useful but most painful walk of his vocation; be he the most competent possible to give us the result of his practical observation, and experience, still you shall not transfer that witness from the witness-box to the jury-box, but you shall ask him what symptoms his experience indicates to him as a test of insanity or sanity, and leave it to the judge, or rather to the jury, to say, whether the man be guilty or not guilty, he being sane or insane."

This is in direct conflict with the rule as adopted in *Commonwealth* v. *Rogers*, but it is the *modern* English practice. See *Rex* v. *Wright*, Russel & Ryan, 451, (1821.) *Regina* v. *Frances*, 4 Cox, C. C., 57, (1849.) In this case, the question was put by the *prosecution*, in these words, to a physician who had been in court during the whole case: "Whether, from all the evidence he had heard both for the prosecution and the defence, he was of opinion that the prisoner, at the time he did the act in question, was of unsound mind?" *Alderson, B.*, immediately interposed, saying: "I cannot allow such a question to be put." McNaughten's case, and the opinion as given above, was then cited. CRESSWELL, J. then added: "That case decides that the question cannot be put as a matter of right," and Alderson said: "And I do not think that it ought to be put at all. *I am quite sure that decision was wrong.* The proper mode is, to ask what are the symptoms of insanity, or to take particular facts, and assuming them to be true, to ask whether they indicate insanity on the part of the prisoner. To take the course suggested is really to substitute the witness for the jury, and allow him to decide upon the whole case. The jury have the facts before them, and they alone must interpret them by the general opinions of scientific men." *Cresswell, J. concurred.* The following year the same question arose before Lord Campbell, on an issue to try the mental competency of a testator to make a will. The question was in a similar form as that in *Regina* v. *Frances*. Lord Campbell said, "I have not the slightest hesitation in overruling it. The witness may give general scientific evidence on the causes and symptoms of insanity, but he must not express an opinion as to the result of the evidence he had heard with reference to the sanity or insanity of the testator" — his Lordship saying peremptorily that he would not allow a physician to be substituted for a jury. *Doe d. Bainbrigge* v. *Bainbrigge*, 4 Cox, C. C. 454, (1850.)

In the same year, on the trial of Robert Pate, before Baron Alderson, for an assault upon the Queen, a medical gentleman was about to testify, "From all I have heard to-day, and from my personal observation, I am satisfied the prisoner is of unsound mind." The presiding judge with some indignation interposed, "Be so good, Dr.——— as not to take upon yourself the functions of both the judge and jury. If you can give

us the results of your scientific knowledge in this point, we shall be glad to hear you; but while I am sitting on this bench, *I will not permit any medical witness to usurp the functions of both the judge and the jury.*" But *how* usurp the functions of the jury? True it is, the jury are to give their opinion upon the direct question, "whether the prisoner was or was not insane." And true it is that such is the identical question sought to be put in these cases to medical gentlemen. But how is that trenching upon the rights and powers of the jury? In every investigation where matters of science, trade, &c., are involved, would not the same objection lie? For instance, an experienced physician and surgeon sits at the trial of a person, for murder, by poison, or perhaps by violence; he hears the witnesses describe the wound, its locality, length, depth and breadth, the symptoms of the sufferer, and the graduai wane of life, and the approach of death; may he not then be asked whether, in his opinion, as a gentleman conversant with similar cases, such death was caused by the wound inflicted, or the poison administered? And yet that is the very question which the jury must determine for themselves, in forming their general verdict of guilty or not guilty. Shall it be said that, for that reason, they shall not have the benefit of the opinion of persons more competent? Is that the English practice in other cases where some other issue than insanity is raised? Take the frequent case of actions involving the issue of careful or negligent management of a vessel. The question for the jury in such cases is, was the master guilty of negligence, that is, what is their opinion about it? and yet it is every day's practice at such trials in England, to call nautical men, who have heard the evidence, but who knew nothing of the facts of the particular case, and ask them, supposing the facts to be true as testified, was the master guilty of negligence? See an instance in *Malton* v. *Nesbit*, 1 Carrington & Payne, 70, (1824,) before Lord Tenterden. Is that usurping the province of the jury?

It seems to us that such is the very best evidence that could be laid before a jury. The object of such a question is not to decide the fact itself, but to give the jury additional means for deciding it for themselves, viz.: the opinion of disinterested persons, who on account of their professional knowledge, are more competent to judge than persons in the ordinary walks of life. See also *Fenwick* v. *Bell*, 1 Carrington & Kirwan, 312, (1844,) which was for collision of two vessels, whereby the plaintiff's was injured. A witness, who had heard the trial, was asked whether, supposing the facts as proved by the plaintiff to be true, the collision *could have been avoided by proper care on the part of the defendants?* Now that was the precise question the jury were to try, and in that case the very objection was taken, but it was overruled and the question put.

Lord Ellenborough has also sanctioned the same kind of evidence in *Beckwith* v. *Sydebotham*, 1 Campbell, 116, (1807,) where the issue was whether a vessel insured by the defendant was seaworthy. The defendant called eminent surveyors of ships, *who had never seen the vessel lost*, to prove that on the facts testified by others, she could not have been seaworthy at the commencement of the voyage. The same objection was raised again, that this was an inference which the jury, and the jury alone, were to draw. But Lord Ellenborough held that this was like examining a physician or surgeon, to say whether, upon such and such symptoms, a person whose life was insured, could, at the time of insurance, have been in a good state of health — "where there was a matter of skill or science to be decided, the jury might be assisted by the opinion of those peculiarly acquainted with it from their professions or pursuits." See also *Thornton* v. *Royal Exchange Assurance Co.*, Peake, 25.

We have confined ourselves, in the citation of these analogies, to English decisions, because it is only in that country that the mode of putting

the question practiced in *Commonwealth* v. *Rogers*, is disapproved. The distinction between asking a physician whether, in his opinion, a certain individual *was or was not* insane? and asking him whether the acts which that person committed, in his opinion, *indicate* sanity or insanity? is certainly perceptible, but, as we think, it is a distinction without a difference. The latter is a *general* question of science and experience, as to the usual and ordinary evidence or criteria of insanity, and the former is but an application of the same general principle of science and experience, to the manifestations of a particular case. Possibly it may not be competent to ask a witness his opinion whether the act charged was *caused* by the insanity of the prisoner, since that would be excluding all other agencies, (*Wright's case*, 1 Russ. & Ryan, 456,) but that is a very different question from asking his opinion of the person's sanity or insanity. The rule of our leading case, therefore, seems best supported by principle and analogy.

The opinions, therefore, of physicians being competent testimony, and they being permitted to give their opinion upon the direct question, whether the accused was, or was not insane, can they also be asked whether, in their opinion, the prisoner was capable of distinguishing between right and wrong? Such a question was disallowed and disapproved by Baron Rolfe, in *Regina* v. *Layton*, 4 Cox, C. C. 155, he saying it was a question which no man could be prepared to answer. On the other hand, the question was put and allowed in America, on cross-examination, to a physician who had testified in chief that he believed the party was insane. See *Clark* v. *The State*, 12 Ohio, 483, (1843.)

Physicians, however, are not permitted to give their *mere* opinion of a person's sanity; they must also give the facts and circumstances on which their opinion is founded, otherwise the opinion will be entitled to very little weight — *Clark* v. *The State*, 12 Ohio, 483, (1843;) *Hathorne* v. *King*, 8 Mass. 371, (1811,) — and has sometimes been excluded *altogether*. *Dickinson* v. *Barber*, 9 Mass. 225, (1812.)

Opinions of witnesses not professional. That witnesses, *not professional*, cannot give their opinion from facts disclosed at the trial, and cannot give their opinion at all upon the question of insanity, unconnected with facts and circumstances upon which such opinion is founded, is entirely clear. It may be that witnesses to a will form an exception to this rule, and it is not unusual, upon an issue to try the sanity of a testator, to ask such persons the abstract question alone, whether, in their opinion, the testator was, at the time of execution of the will, of sound mind. But this exception does not impair the rule itself, which is sustained by reason and authority. *Gibson* v. *Gibson*, 9 Yerger, 329, (1836.) *Potts* v. *House*, 3 Georgia, 325, (1849.) *Dicken* v. *Johnson*, 7 Georgia, 484, (1849.) *The State* v. *Brinyea*, 5 Alabama, 241, (1843.) *Doe d. Sutton* v. *Reagan*, 5 Blackford, 217, (1839.) *McCurry* v. *Hooper*, 12 Alabama, 823, (1848.)

But on the broader question, whether witnesses, not professional, but who have, for a long time, personally known the individual charged with insanity, and have had opportunities of observing him, his habits, manners and conduct, can give their opinion of his insanity, there is more room for doubt and difference of opinion. This evidence was admitted, after much deliberation, in *Clary* v. *Clary*, 2 Iredell, 78, (1841,) on an issue to try the sanity of a testator, and the reasons for its admission were ably stated by Gaston, J. If admissible in such case, we can see no reason why it should not be whenever the question of sanity or insanity is in issue. The American authorities generally favor the admission of such evidence, requiring, however, that the witness should first state the facts and circumstances

on which his opinion is founded. *Clark* v. *The State*, 12 Ohio, 483, (1843.) *Grant* v. *Thompson*, 4 Connecticut, 203, (1822.) *Rambler* v. *Tryon*, 7 Sergeant & Rawle, 90, (1821.) *Wogan* v. *Small*, 11 Sergeant & Rawle, 141, (1824.) *Morse* v. *Crawford*, 17 Vermont, 499. *Lester* v. *Pittsford*, 7 Vermont, 158. *Gibson* v. *Gibson*, 9 Yerger, 329, (1836). *Potts* v. *House*, 6 Georgia, 324, (1849). *Calver* v. *Haslam*, 7 Barbour, 374, (1849,) where the subject is examined at length. *Baldwin* v. *The State*, 12 Missouri, 223, (1848.) *De Witt* v. *Barley*, 13 Barbour, 550, (1852.) *Kinne* v. *Kinne*, 9 Conn. 102. *Norris* v. *The State*, 16 Alabama, 776, (1849.) It is also admitted in the English ecclesiastical courts. *Wheeler* v. *Wheeler*, 3 Hagg. 574.

But with deference to the decisions of so many very respectable tribunals, it is not easy to see the grounds upon which such testimony is competent. That ordinary witnesses cannot give their *mere* opinion, unsupported by facts and circumstances, *all agree*. Why then, should the fact that such witnesses have stated facts which may tend to satisfy the jury of the insanity, enable the witness to give his opinion, when he otherwise could not, or make that competent evidence which before was not so? The disclosure of the facts and circumstances on which the opinion was based, might, *if the opinion were admissible at all*, add much to its weight and strength; it might affect materially its *credibility;* but that is a very different question from its *competency;* the one is solely for the jury, the other solely for the court. In some courts, such evidence is not admitted, and persons, not experts, nor subscribing witnesses to a will, are not permitted to state their opinion as to a person's sanity, although they first state the facts and circumstances on which it is founded. *Commonwealth* v. *Wilson*, 1 Gray, (Mass.) 337, (1854.) *Poole* v. *Richardson*, 3 Mass. 330, (1807.) *Needham* v. *Ide*, 5 Pick. 510.

III. *What degree of proof is sufficient to authorize the finding of a verdict of insanity?*

That every man is presumed to be sane until the contrary appears, has become an axiom of the law; and therefore that it is incumbent on the prisoner to establish the fact of insanity, whenever he relies upon such a defence, has been again and again declared. *Attorney General* v. *Parnther*, 3 Brown, C. C. 441, (1792.) *Lee* v. *Lee*, 4 McCord, 183, (1827.) *Jackson* v. *King*, 4 Cowen, 207. *Hoge* v. *Fisher*, 1 Peters, C. C. 163, (1818.) *Jackson* v. *Van Dusen*, 5 Johnson, 144. *State* v. *Stark*, 1 Strobhart, 479, (1847.) *Regina* v. *Layton*, 4 Cox, C. C. 149, (1849.) *Regina* v. *Stokes*, 3 Carr. & Kirwan, 188, (1848.)

Whether, in a criminal case, this rule is always true in its whole length and breadth, may be discussed in a future note on the "Burden of Proof," but the authorities as yet recognise no distinction between civil and criminal cases, in this respect. For the present, therefore, we assume as true, the language of Rolfe, Baron, in *Regina* v. *Taylor*, 4 Cox, C. C. 155, that "In cases of insanity, there is one cardinal rule *never to be departed from*, viz.: that the burden of proving innocence rests on the party accused. Every man committing an outrage on the person or property of another must be, in the first instance, taken to be a responsible being. Such a presumption is necessary for the security of mankind. A man going about the world, dealing and acting as if he were sane, must be presumed to be sane, till he proves the contrary." See also *Regina* v. *Stokes*, 3 Carrington & Kirwan, 188, (1848.) The question therefore is, said that acute minded judge, not "whether the prisoner is of sound mind, but whether he has made out to the satisfaction of the jury that he was of unsound mind." For, of course, if the prisoner must prove his insanity, he must prove it *to the satisfaction of a jury*. But what *degree* of satisfaction must he produce in their minds to entitle him to an

acquittal? Does the same burden devolve upon him, as upon the government to prove the *corpus delicti?* Must he satisfy the jury beyond a reasonable doubt, or by a fair balance of testimony? The same rule has been sometimes applied to the prisoner as to the government. Thus, in *The State* v. *Brinyea*, 5 Alabama, 244, (1843,) the judge at *nisi prius* ruled that "it was incumbent upon the State to make out the prisoner's guilt beyond all reasonable doubt, but if the act was proved, then the prisoner was bound to make out by the testimony, *beyond all reasonable doubt*, that he was insane at the time the act was committed, by proof strong, clear, and convincing. But if, upon the testimony, the jury entertained no reasonable doubt of the defendant's sanity, they should find him guilty." And this ruling was affirmed on error. The same rule is said to have been adopted in *The State* v. *Masler*, 2 Alabama, 43, (1841.)

Rolfe, B., in *Regina* v. *Stokes*, 3 Carrington & Kirwan, 188, (1845,) says: "If the prisoner seeks to excuse himself upon the plea of insanity, it is for him to *make it clear* that he was insane at the time of committing the offence charged. The *onus* rests on him, and the jury must be *satisfied* that he was actually insane. *If the matter be left in doubt*, it will be their duty to convict." The same was said in *The State* v. *Stark*, 1 Strobhart, 479, (1847.)

Chief Justice Hornblower, in *The State* v. *Spencer*, 1 Zabriskie, 202, (1846,) said with some emphasis: — "Where it is admitted, or clearly proved, that the prisoner committed the act, but it is insisted that he was insane, and the evidence leaves the question of insanity in doubt, the jury ought to find against him. *The proof of insanity at the time of committing the act, ought to be as clear and satisfactory, in order to acquit a prisoner on the ground of insanity, as proof of committing the act ought to be, in order to find a sane man guilty.*"

But a milder and more merciful rule was adopted in our leading case, viz.: That if the prisoner satisfied the jury by a *preponderance* of the evidence that he was insane, the defence was made out.

And is not this the true rule in all cases? It being a universally admitted principle, that in all causes between *party* and *party*, the proof of any fact by the preponderance of testimony is all that is requisite, is not the only exception to this rule, the case where the government is one party, and the individual the other? And is not this exception, requiring proof beyond a reasonable doubt of the prosecution, an exception *in favorem vitæ;* the natural result of the legal presumption of innocence, always allowed, and should it not be limited and applied only to the precise case on which it is founded? Is not the analogy of the criminal law in favor of the less stringent rule? For instance, when the defence for homicide is that gross provocation existed, reducing the crime from murder to manslaughter, is the defendant bound to prove the provocation beyond a reasonable doubt, or only by a preponderance of testimony? The latter was the opinion of the court in *Commonwealth* v. *York*, 9 Metcalf, 94, (1845.)

So, where the defence is an *alibi*, must the defendant make out, beyond all doubt, that he was elsewhere at the time of the commission of the crime? And if the jury fairly and truly doubt whether he was the person who gave the fatal blow, is he not clearly entitled to an acquittal?

And in prosecutions for violations of some statutory laws, as game laws, or license laws, if the defence rests on the fact that the defendant was a qualified or licensed person, is not that fact made out by a *preponderance* of the testimony? See *Smyth* v. *Jefferies*, 9 Price, 257, (1821.)

In like manner, when the defence to an assault and battery is, that the blow was accidental, if the proof of that fact is ever upon the defendant,

is not the defence established by a fair balance of the testimony on his side?

And if infancy or coverture be the defence, does not the same rule apply? Why should a different rule obtain when the defence is insanity?

E. H. B.

Supreme Judicial Court, Suffolk, ss., March Term, 1855.

JOHN A. HANSON, PETITIONER IN EQUITY, *vs.* JAMES W. PAIGE ET AL., ASSIGNEES OF J. W. BLODGETT & CO.

Insolvent Law — Assignment — Partnership.

In a petition by a partnership for the benefit of the insolvent law, there must be a substantial averment that the partners, in their individual capacity were insolvent, but no precise formula of words is required to state that fact. When a petition stated that they (the members of a partnership) were merchants and partners, and "that they are indebted, in divers sums of money, &c., which they are unable to pay in full," it was held that the word "they" was not to be restricted in its reference to the firm, but referred also to the partners individually.

It is sufficient if the warrant follow the petition, and it therefore need not require the messenger to take possession of the separate estate of the partners. And if he fails to do so, all the property of the partnership, and of the partners, passing to the assignees by the commissioner's assignment, they have full authority to take and dispose of it in the execution of their trust.

If the names of any persons who are not partners are included in the petition, the proceedings may be stayed as to them, but their validity as to the actual partners will not be affected.

THIS cause was argued at the present March term of the Supreme Court, by *J. W. Hubbard*, for the petitioner; *A. H. Fiske*, for the assignees of J. W. Blodgett & Co.; and *B. F. Brooks*, for J. W. Blodgett and W. Gore, Jr.

The facts are stated in the opinion of the Court, which was delivered by

THOMAS, J. The petition of Hanson sets forth in substance that he is a creditor of John W. Blodgett and Watson Gore, Jr., partners under the firm of J. W. Blodgett & Co., holding their promissory note, over due, for $1260; that for the purpose of collecting the note, on the twenty-second of February last, he sued out of the Clerk's office of the Common Pleas, a writ against J. W. Blodgett and Watson Gore, Jr., and caused personal property of the firm of Blodgett & Co. to be attached; and that James W. Paige and others, claiming to be assignees in insolvency of the said Blodgett & Co., replevied the property so attached, and have given

notice to the petitioner that the property attached belongs to them as such assignees, and that they commenced the suit of replevin in discharge of their trust.

The petition further shows, that on the 11th of December last, John W. Blodgett signed and presented to Charles Demond, Esq., Commissioner of Insolvency for the county of Suffolk, an application for the benefit of the insolvent laws. The petition is as follows:

To Charles Demond, Esquire, Commissioner of Insolvency, within and for the county of Suffolk, and Commonwealth of Massachusetts.

Humbly shows, John W. Blodgett, in behalf of himself and S. S. Stone, J. C. Bundy, W. Gore, Jr., A. Goodnow, and T. S. Mandell, all of Boston, merchants and co-partners, under the firm of John W. Blodgett & Co.

That they are indebted in divers sums of money, amounting, in the whole, to not less than two hundred dollars, which they are unable to pay in full; and they wish to surrender all their property, for the benefit of their creditors, and obtain their discharge from their said debts, according to the statutes in this behalf provided.

Wherefore he prays that a warrant may be issued for taking possession of their estate, and that such further proceedings may be had in the premises, as the law in such cases prescribes.

J. W. BLODGETT.

That on the same 11th of December, the said commissioner issued his warrant to the sheriff or his deputies, to take possession of the estate of Blodgett & Co., and directing him to give notice that a meeting of the creditors would be held on the 23d of December.

The warrant and return of the officer thereon, were as follows:

(Warrant.)

COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss.

IN INSOLVENCY.

Before Charles Demond, Esq., Commissioner of Insolvency, in and for the said county of Suffolk. In the matter of John W. Blodgett, S. S. Stone, John C. Bundy, W. Gore, J. A. Goodnow and T. S. Mandell, all of Boston, merchants and co-partners, under the firm of John W. Blodgett & Co., insolvent debtors.

To the Sheriff of the said county of Suffolk, or either of his Deputies.

You are hereby required, as Messenger, to take possession of all the estate, real and personal, of the said insolvent debtors, excepting such as is, by law, exempted from attachment, and of all their deeds, books of account, and papers; and keep the same safely, until the appointment of an assignee or assignees.

And you are also required to give public notice by advertisements, to be published twice inside, in the newspapers called the Boston Daily Journal, and Daily Advertiser, printed at Boston, the first publication to be made forthwith:

1. That this warrant has issued.

2. That the payment of any debts and the delivery of any property belonging to the said insolvent debtors, to them, or for their use, and the transfer of any property by them, are forbidden by law.

3. That a meeting of the creditors of the said insolvent debtors will be held at a Court of Insolvency, at the Commissioner's Room, in the Court House, in Boston, on the twenty-third day of December current, at nine o'clock in the forenoon, for the proof of debts, and the choice of an assignee or assignees.

You will also send written notice, within five days after the date hereof, to the creditors of the said insolvent debtors, named on their schedule of creditors to be delivered to you by them, within three days after the date hereof, of the time and place of the said meeting. And you will there have this warrant, with your doings thereon.

Witness my hand and seal, this eleventh day of December, in the year one thousand eight hundred and fifty-four.

CHARLES DEMOND,
Commissioner of Insolvency.

(OFFICER'S RETURN.)

Suffolk, ss.

DECEMBER 23, 1854.

By virtue of this warrant, I have taken possession of all the property of the within-named John W. Blodgett & Co., that has come to my knowledge. I have also published the notification prescribed in this warrant, twice inside, in each of the newspapers within mentioned; I further certify that I have sent written notices to each of the creditors named in the schedule returned with this warrant, within five days from the date of said warrant, which schedule was received by me within three days from the date of this warrant. The first publication aforesaid was made on the 11th day of December instant.

BENJAMIN F. BAYLEY,
Deputy Sheriff.

That a meeting of creditors was held, claims proved, and James W. Paige and others chosen assignees, and that on the same day the commissioner executed an assignment to them, of the construction of which no question is made.

That a second meeting of creditors was called, to be holden on the 2d of March, and that said assignees have proceeded with the execution of their trust.

The petitioner then states that four of the persons named in the petition of Blodgett, were not partners: Bundy, Stone, Goodnow and Mandell.

The petitioner then avers that the proceedings in insolvency are null and void:

1st. Because it is not alleged, and does not appear in the petition to the commissioner, that the partners individually were insolvent.

2d. Because the warrant did not require the messenger to take possession of the separate estate of the partners.

3d. Because the messenger did not take possession of the separate estate of the partners.

4th. Because Bundy, Stone, and Goodnow were not partners, and ought not to have been included in the petition.

The prayer is, that the insolvent proceedings be declared null and void, the proceedings stayed, and the assignees enjoined and restrained from the further prosecution of their suit in replevin.

To the petition appropriate answers were filed by the assignees and Blodgett and Gore.

Under the provisions of the fifth section of the statute of 1838, chapter 163, in all suits prosecuted by the assignees for any debt belonging to the insolvent debtor, the assignment made to them by the judge or commissioner is made conclusive evidence of their authority to sue as such assignees. This is so, although the prior proceedings may have been defective or erroneous, the remedy of the party aggrieved being by application to the court sitting in equity, and under the provisions of the same chapter, § 18, to arrest the proceedings if they have been irregular, to order an injunction on the assignees in the prosecution of suits at law or other proceedings and to supersede and set aside the assignment. *Partridge* v. *Hannum*, 2 Met. 569; *Wheelock* v. *Hastings*, 4 Met. 504; *Grant* v. *Lyman*, 4 Met. 470.

The petitioner is rightfully before this court, sitting in equity.

The question is, whether the proceedings are defective, and, for that cause, null and void.

Of the four objections made to the validity of the proceedings, the first only has presented any difficulty — that is, that it was not alleged in the petition that the partners, in their individual capacity, were insolvent.

A preliminary question was made, whether that allegation is necessary. We cannot doubt that there must be a substantial averment of this fact; for if one of the partners were solvent, such solvent partner would have the legal right of settling the affairs of the partnership, and the com-

missioner would have no power to take by his warrant the partnership property out of his hands.

Again, as such partner is liable *in solido* for the debts of the concern, a partnership cannot with strictness be said to be insolvent, while any of the partners are able to pay its debts. But no precise formula of words is required in which to state this fact; though technical accuracy is very desirable in these matters, it is not absolutely essential.

The petitioner, in behalf of himself, and Stone, Bundy, Gore, Goodnow, and Mandell, whom he states are merchants of Boston, and copartners, under the firm of John W. Blodgett & Company, sets forth that they are indebted in divers sums of money, amounting in the whole to not less than two hundred dollars, which *they* are unable to pay in full. The suggestion is, that the word *they* is to be referred to the company only, and that the allegation, therefore, only is, that the *firm* is insolvent. If this were so, for the reason before stated, that each partner is liable for the entire debts, an allegation of the insolvency of the firm would seem to include the insolvency of all its members. But the word *they* is not to be thus restricted. No rule of construction requires or warrants such interpretation. The averment is not that the persons named are in the relation as partners indebted. The allegation is more general and comprehensive: — "*they* are indebted in divers sums of money, which *they* are unable to pay in full;" that is, that they, in their individual or collective capacity, in all the capacities they have, are unable to pay in full. *They* are indebted in divers sums of money, which *they* are unable from any source to pay. So the averment that *they* wish to surrender all *their* property, extends to all their property, held in any capacity, which is applicable to such payment. "For the benefit of their creditors" means for the benefit of the creditors of all of them, and of each and every one of them.

The warrant follows the petition, and is sufficient.

If the service of the warrant was defective, by reason of a failure to take possession of the individual property of the partners, that defect is easily cured. The commissioner's deed has conveyed all the property of the insolvents, partnership and private, to the assignees, and they have full authority to take it and dispose of it in the execution of their trust.

If the petition, warrant, and assignment included per-

sons who were not partners, the proceedings may be stayed as to them, without affecting their validity as to those conceded to be partners.

The case of *Parker* v. *Phillips*, 2 Cush. 175, cited by the petitioner, is wholly unlike the case at bar. That was a petition by one partner, after the dissolution of the firm. The allegation of the partner petitioning, was, that he, individually, and as such partner, was indebted in divers sums of money which *he* was unable to pay in full. There was no allegation that the firm was insolvent, or that the other partner was insolvent. One partner, of course, may be insolvent, though the firm is solvent; though the converse of the proposition be not true.

The case of *Dearborn* v. *Keith*, 5 Cush. 224, was a petition presented, not only after the dissolution of the partnership, but after another petition had been filed, and proceedings instituted under it, by which the individual property of the petitioner, and the partnership property in his hands had been taken. The fatal defect in the petition was, that it asked to surrender only the property of the firm for the benefit of the creditors. It neither alleged in terms that the other partner was insolvent, nor asked to have his property taken. The proceedings under this his second petition were superseded on two grounds: the defect in the petition, and the conflict and confusion of rights which would necessarily result, if both processes were suffered to go on at the same time.

Petition dismissed.

Recent English Decisions.

Rolls Court, Saturday, July 8, 1854.

CALLEY *v.* RICHARDS.

Practice— Privileged Communications — Solicitor or Agent.

Communications between the plaintiff and a person, formerly a solicitor, and whom the plaintiff believed to be so still, seeking and giving professional advice, come within the rule as to privilege.

IN this case the question whether certain letters were or were not privileged communications, was brought before the consideration of the court by adjournment from chambers.

The defendant having obtained the usual order for the production of documents in the plaintiff's possession, the plaintiff claimed privilege for certain communications by letter between him and Mr. Mullings under these circumstances. The plaintiff wrote to Mr. Mullings, who had, for many years, practised as a solicitor at Cirencester, and more recently, in partnership with another gentleman, and had been the solicitor of the plaintiff, as his professional adviser, for his advice and assistance with respect to the matters which subsequently became at issue in this suit, and Mr. Mullings wrote four letters in reply to such communications. It appeared that Mr. Mullings had previously retired from practice (but by an arrangement with his partner, his name continued in the firm;) these circumstances were, however, unknown to the plaintiff at the time. The communications in question had reference to the competency of a person then living to make a will (one of the questions in this suit,) and the plaintiff's affidavit stated that the letters to Mr. Mullings were written in contemplation of the present litigation.

Lloyd and *J. V. Pryor*, for the defendant, in support of the application for production of the letters. Mr. Mullings is neither the solicitor of the plaintiff, nor an agent employed as the medium of communication with his solicitor, and the letters are, therefore, not entitled to privilege. *Fountain* v. *Young*, 6 Esp. 113; *Wilson* v. *Rastall*, 4 T. R. 753; *Greenlaw* v. *King*, 1 Beav. 137; *Bunbury* v. *Bunbury*, 2 Beav. 173; *Steele* v. *Stewart*, 1 Ph. 471; *Carpmael v. Powis*, Ib. 753. The correspondence cannot be treated as being in contemplation of the suit within the rule, as laid down in the cases *Holmes* v. *Baddeley*, 1 Phil. 476; *Hawkins* v. *Gathercole*, 1 Sim. N. S. 154; *Walsingham* v. *Goodrick*, 3 Ha. 122.

Palmer, Q. C., and *Cairns*, for the plaintiff, were not called on.

The Master of the Rolls. — I am of opinion that these letters are privileged. It is objected that Mr. Mullings was not a solicitor at the time when they were written. The communications from the plaintiff to Mr. Mullings were made to him as his professional adviser, and Mr. Mullings replies to these letters, not disclosing the fact of his retirement. Mr. Mullings's name remained in the firm of which he had been a member, and the plaintiff swears that he did not know that Mullings had ceased to be a solicitor. Is

then the privilege of the plaintiff to communicate with his solicitor in the fullest manner, and which the plaintiff supposed he was exercising, to be destroyed under these circumstances? I am of opinion that it is not. If I am wrong in my decision, I think the consequences would be serious. A client might employ a solicitor, who, during the progress of the cause, might omit to take out his certificate, and the privilege would be destroyed although the client would know nothing about the omission. I think the result would be to defeat the operation of the rule, the object of which is that the plaintiff may communicate in the most unreserved manner with his professional adviser. The case is very different where, as in *Wilson* v. *Rastall*, the party consults a person who had stated that he could not act as his attorney, and the communication there would not come within the reason of the rule. *Fountain* v. *Young* is certainly a strong case; but if the report of that case be correct, the rule there laid down, limiting the privilege to communications directly between the client and the solicitor, is not now the rule of this court, for, by the latter cases, the rule has been carried out to its proper limits; and communications made through an agent are as much privileged as if made direct by the client, although the employment of an agent was not necessary. I think, therefore, that this objection to these communications being privileged fails. It is, however, also argued that these communications did not take place in contemplation of litigation. But, although at the time no litigation could be commenced, yet there were good reasons for supposing that litigation would ensue, and, therefore, there were good grounds for obtaining legal advice in anticipation of such an event. There is an affidavit to that effect in this case, and I think that *Herring* v. *Clesbury*, 1 Phil. 19, and *Holmes* v. *Baddeley*, apply, and that these communications are protected.

Court of Common Bench, Saturday, Nov. 4, 1854.

GRIFFITHS *v.* TEETGEN.

Seduction — Relation of Master and Servant — Temporary Service.

The plaintiff's daughter, living at home with her father, but having formerly been in the service of the defendant, was invited by his wife to return to defendant's house and take care of their shop whilst she was away, and was promised a gratuity for so doing. She complied,

and was seduced by the defendant whilst staying there. On the return of defendant's wife, plaintiff's daughter was sent away, and a gratuity of 8*s.* made for her services. Eventually she returned home, and was afterwards turned out of doors by her father.

Held, that the above facts disclosed sufficiently the relation of master and servant between the plaintiff and his daughter to enable him to maintain an action for seduction.

THIS cause was tried before the Lord Chief Justice at the sittings after term, in London, and a verdict found for the plaintiff, damages £25, with leave reserved to enter a verdict for the defendant, if the court above should be of opinion that the facts were insufficient to support an action.

Prentice now moved accordingly. — It was an action brought by the plaintiff against the defendant for the seduction of his daughter and servant; to which the defendant pleaded, first, not guilty; secondly, that the daughter was not plaintiff's servant as alleged. The question is whether, under the circumstances, the daughter was the servant of the plaintiff so far as to enable him to maintain an action for the loss of her services. The evidence of the daughter showed that she had formerly been in the service of the defendant, but had returned home. Early in April, 1853, the plaintiff's wife having written to her, requesting her to come and take care of the house and shop whilst she went from home, the young woman did so with her parents' consent. A gratuity was promised her. That was on the 11th April, 1853. On the second night after she went, the plaintiff entered her bed and debauched her. She stayed at the plaintiff's till the 11th of May, when Mrs. Teetgen returned, and on leaving the house, the latter gave her 8*s.*, asking her if she was satisfied. The young woman did not at first return home, but she afterwards did so; but her father subsequently, when he found she was with child, turned her out of doors; she was delivered of a child on the 16th January last. From this statement of facts it will be seen, that the plaintiff's daughter, at the time of the alleged seduction, was not his servant, but she was the servant of the defendant, and that, too, at stated wages of 4*s.* a week. The promise was to pay her 5*s.* a week. [JERVIS, C. J. — The question of servitude in these actions is merely a technical one.] But the service must nevertheless be proved. This young woman was actually paid wages under a promise to do so, and therefore clearly the plaintiff's servant. [MAULE, J. — At the time she left her father's she was living with him

as his servant; she went to the defendant's at the request of his wife, but with an intention of returning home on the return of the wife from the country.] When she left the defendant's she did not go home, but went to another place. [JERVIS, C. J.—Yes, for a short time; but she eventually returned home.] [MAULE, J. — Here is a man invites the plaintiff's daughter to his house, debauches her, and she goes back to her father's; that is surely sufficient to maintain an action for loss of services such as this.] There is a case opposed to that view, *Blamire* v. *Haley*, 6 M. & W. 55. [JERVIS, C. J. — How can this be construed as more than going from home to visit a friend? CROWDER, J., referred to *Speight* v. *Oliviera*.] It should not be overlooked that the young woman had formerly been in the service of the defendant; and she was paid wages for the services rendered when there the second time. [JERVIS, C. J. — As to the question of wages, there was nothing definite shown at the trial. The letter of defendant's wife asking the young woman to go and keep house was not produced at the trial, so there is some obscurity as to the payment of wages by the defendant. Something was said about its having been agreed she should have a gratuity; and, on her return, defendant's wife gave her 8*s*., and asked if she were satisfied.] That is sufficient to constitute her a servant of the defendant; for whether the service be a month, a week, or day, is immaterial.

MAULE, J. — I conceive that there was here a good ground of action.

JERVIS, C. J. — In this application, the attempt to make out that there existed between the young woman and her father any other relationship than that of master and servant, as it is considered in actions of this nature, has failed; the rule therefore must be refused.

CROWDER, J. — The girl's was a mere temporary absence from home, and the service to the father was still subsisting.

Rule refused.

WEGENER *v.* SMITH.

Demurrage — Right to recover against Consignee of Goods.

By charter-party the shipper of goods agreed to pay demurrage. The bill of lading sent to the consignee stated the goods were to be delivered on payment of freight, and upon other conditions as per char-

ter-party. The consignee refused to pay demurrage; he afterwards received the goods on payment of freight:

Held, that the acceptance of the goods by the consignee and the abandondonment of his lien by the master, was evidence to go to the jury whether the defendant was liable to pay demurrage.

THIS action, tried at Durham before CROWDER, J., was brought by the plaintiff, as master of the *Gustave Adolphe*, to recover demurrage from the defendant, who was the consignee of a bill of lading of certain timber.

Plea — Never indebted.

There was put in evidence a charter-party made between one Scheber and the plaintiff, by which it was agreed, *inter alia*, that in case of any detention of the vessel, the master should be paid £5 for every provable lay-day. The freight was payable on delivery. The bill of lading stated that the timber was to be delivered to order against the payment of the agreed freight, and according to the other conditions as per charter-party.

The plaintiff sailed from Stettin with the timber, and arrived at Sunderland on the 8th December, and applied to the defendant, to whom the timber was consigned, to have the ship delivered. There was a dispute between the plaintiff and defendant; and the latter, from the beginning, refused to pay demurrage. He showed the plaintiff the bill of lading, and demanded the timber on the payment of freight. Ultimately the timber was delivered and the freight paid; and then this action was brought for the demurrage. The jury found a verdict for the plaintiff.

Watson, *Q. C.*, now moved for a rule calling on the plaintiff to show cause why the verdict should not be set aside, and a verdict entered for the defendant; and why there should not be a new trial on the ground of misdirection, and of the verdict being against evidence. This case ought not to have gone to the jury. The defendant from the first protested against paying demurrage; and it being a matter of fact whether the consignee of the bill of lading has undertaken to pay demurrage, there was no evidence to make him liable. The bill of lading, though referring to the charter-party, did not embody it; and the defendant is not liable for the demurrage agreed upon. In *Sanders* v. *Venzeller*, 4 Q. B. 200, it is held that, whether the holder of a bill of lading is liable to pay demurrage is a matter of fact. [JERVIS, C. J. — In that case it is said that the taking of the goods may be left to the jury as

evidence whether he is liable to pay demurrage.] But the defendant said from the beginning he would not pay.

MAULE, J. — He accepts the goods to which he had no right, except under the bill of lading, which, by reference to the charter-party, says he is entitled to them on payment of freight and demurrage. It is like the man ordering two embroidered coats, and saying he should not pay for them.

JERVIS, C. J. — The bill of lading refers to, and so embodies, the charter-party; and therefore the only question is, whether the defendant received the goods on the terms of the demurrage being paid. The master, by delivering them, gave up his lien to demurrage; and I think it was properly left to the jury to say whether the defendant, by receiving the goods, agreed to pay the demurrage.

Rule refused.

Court of Exchequer, Tuesday, November 7.

ORGAN v. BRODIE.

Liability of Ship-owner — Captain pledging Ship-owner's Credit for illness of Seamen.

A ship-owner is not liable, on his credit being pledged by the captain of the vessel, for necessaries supplied to the seamen during their illness occasioned from an accident on board, their assistance and continuance not being requisite in the prosecution of the voyage.

THIS was an action brought by a publican at Sheerness against the owner of a trading vessel (a collier,) for attendance and necessaries supplied to several seamen who had been on board the defendant's vessel. It appeared, that near Sheerness some accident occurred on board the vessel, and several of the seamen were thereby injured; they were, therefore, removed and taken to the house of the plaintiff, a publican at Sheerness, who provided them, as he was ordered to do by the captain, with such attendance, board, lodgings, and necessaries as were requisite; the plaintiff being told by the captain that the owner of the vessel would pay for them. Other men supplied the places on board the vessel of those who met with injury from the accident, and the vessel continued its voyage, whilst those men who met with the accident remained at the plaintiff's house for some time afterwards, and until their recovery; and this action was brought by the publican to recover from the owner the

expenses of the men. The case was tried before the Lord Chief Baron, in London, when the plaintiff was nonsuited.

Bramwell, Q. C. now moved, pursuant to leave reserved, to set aside the nonsuit and enter a verdict for the plaintiff for the amount claimed. The captain had pledged the credit of the owner for these expenses — he assured the publican, when the men were removed from the vessel to his house, the owner would pay for them; he contracted on account of the owner. [PARKE, B. — Was the vessel delayed in consequence of the absence of these men, or was their presence on board necessary before the vessel could proceed?] No; others supplied their place; the vessel went on; the men remained at the plaintiff's house some time after.

PARKE, B. — The captain had no power, under these circumstances, to pledge the credit of the owner; and the defendant is not liable for these expenses. If it had been requisite for the vessel's proceeding on her voyage that these men should have been restored, the case may have been different; but that was not so; the vessel proceeded, and the men remained. The defendant is not liable.

POLLOCK, C. B. and ALDERSON, B. concurring.

Rule refused.

Notices of New Books.

A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES, comprising a Digest of the Penal Statutes of the General Government, and of Massachusetts, New York, Pennsylvania and Virginia, with the decisions of cases arising upon those statutes and a General View of the Criminal Jurisprudence of the Common and Civil Law. By FRANCIS WHARTON, author of "Precedents of Indictments and Pleas." Third Edition. Philadelphia: Kay & Brother, Law Booksellers and Publishers. 1855.

That this work has proved valuable and acceptable to the profession, is shown by the fact that a third edition has been issued within the term of nine years. From the examination which we have been able to bestow upon it, we believe it calculated to supply the want often felt by practitioners in the criminal courts, of a convenient and compendious work of Nisi Prius reference.

But it is also something more than this, and it appears well adapted for a guide in the preliminary studies which are necessary for a due preparation for the trial of a cause. We are glad to see that Mr. Wharton has not restricted himself to making his book a mere index of cases of common and statute law, but that he has drawn upon the too much neglected treasures of the civil law, and upon the modern jurisprudence of the European continent. We hope to see the same method adopted in treatises on other branches of legal science.

We have some doubt of the utility, in a work intended to elucidate the general principles of the criminal law, of attempting a digest of the penal statutes of the individual States of this Union. The diversities in our criminal legislation are as various as the circumstances and character of the different States. To digest the statutes of only a part of the States, is confessedly to construct a work on an imperfect plan. To embrace the whole, would make the volume too expensive and unwieldy to be of general and familiar use. Our criminal law is essentially statutory, at least with regard to crimes above misdemeanors, and, by consequence, local; and a practitioner in New York or Massachusetts can hardly be willing, in purchasing a treatise for his practical use, to pay also for a collection of all the statute criminal law of the States. The volume before us exceeds the usual size of works of the kind. It extends to more than eleven hundred large and closely-printed pages, yet only comprises the statute law of the United States and of four of the States. When the thirty-one, or the indefinite number to which we shall hereafter attain, are included, the work will be too ponderous for ready and familiar use.

The volume before us is well provided with copious notes and references, a full and minute index, and a table of the numerous cases cited. We believe it to be a valuable addition to the resources of the profession, and as such we wish for it its merited success.

A Treatise on the Law of Homicide in the United States, to which is appended a series of Leading Cases on Homicide, now out of print, or existing only in manuscript. By Francis Wharton. Philadelphia: Kay & Brother, Law Booksellers and Publishers. 1855.

This work is by the same author and from the same publishers as that just before noticed. It contains a compendious view of the law in the United States on the subject of Homicide, such as has not, to our knowledge, ever before been attempted. We argue well for the character of this volume, from that of the one just noticed by the same author. We are glad to find a chapter on the divisions of the crime of murder, into murder in the first and second degree — a distinction arising, we believe, in Pennsylvania by statute, from thence adopted in several other States, but unknown to the common law or to the criminal jurisprudence of Massachusetts. The table of contents, and of cases cited, and the index, appear to be well done, and the references are numerous. We welcome the work with the same commendations and good wishes that we have above bestowed on its elder brother.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Arlin, Stephen N.	Lowell,	Feb. 14, 1855,	Isaac S. Morse.
Arnold, Charles G.*	Boston,	" 1,	John M. Williams.
Baldwin, Jonathan	Great Barrington,	" 13,	Lorenzo H. Gamwell.
Bangs, Elbridge †	Boston,	" 16,	John P. Putnam.
Barker, Edmund P.	Boston,	" 3,	Charles Demond.
Bates, George W.	Natick,	" 20,	John W. Bacon.
Blanchard, Isaac	Florida,	" 8,	Shepherd Thayer.
Blodgett, George W.	Charlestown,	" 8,	Isaac S. Morse.
Bricher, William	Boston,	" 10,	Charles Demond.
Butters, Daniel H.	Bedford,	" 24,	Asa F. Lawrence.
Butts, James E., Jr.*	Watertown,	" 1,	John M. Williams.
Byron, George	Quincy,	" 14,	John P. Putnam.

* For Notes to the above references, see next page.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Calkins, Charles W.†	Boston,	Feb. 16,	John P. Putnam.
Cheney, John E.	Boston,	" 7,	Charles Demond.
Cleaveland, Edward C.	Charlton,	" 5,	Alexander H. Bullock.
Clifford, Elizabeth M.	Newburyport,	" 6,	John G. King.
Condrin, James	Newton,	" 5,	Isaac S. Morse.
Crowe, Wm. F.	Boston,	" 2,	John P. Putnam.
Crowell, Nathan, Jr.	Newton,	" 2,	John M. Williams.
Davis, Lewelly P.	Woburn,	" 20,	John P. Putnam.
Eaton, George A.‡	Charlestown,	" 24,	Isaac Ames.
Hale, Isaac K.	Natick,	" 13,	John W. Bacon.
Harrington, George E.	Clinton,	" 19,	Alexander H. Bullock
Hartshorn, Newell§	Walpole,	" 21,	Charles Endicott.
Hebard, Benjamin F.	Dorchester,	" 22,	Isaac Ames.
Hill, Samuel F.	Boston,	" 27,	John M. Williams.
Hoyt, John Q.‡	Charlestown,	" 24,	Isaac Ames.
Hoyt, Wm. H.‡	Boston,	" 24,	Isaac Ames.
Hudson, John O.	East Bridgewater,	" 6,	Welcome Young.
King, Wm.	Adams,	" 26,	Shepherd Thayer.
Knapp, Wm F	Northampton,	" 12,	I. F. Conkey.
Ladd, Horace W.	Springfield,	Jan. 22,	Henry Vose.
Lincoln, Lewis	Northboro',	Feb. 17,	Alexander H. Bullock.
Locke, Horace	Winchester,	" 15,	Isaac S. Morse.
Longley, Benjamin A.‖	Boston,	" 12,	Charles Demond.
Longley, Isaac A.‖	Boston,	" 12,	Charles Demond.
Lothrop, Barnabas	Randolph,	" 2,	Samuel B. Noyes.
Martin, George D.¶	Roxbury,	" 14,	John P. Putnam.
Mason, Stephen N.	Lowell,	" 8,	Isaac S. Morse.
Melendy, John	Southbridge,	" 23,	Alexander H. Bullock.
Morey, George P.§	Walpole,	" 21,	Charles Endicott.
Morton, James C**	Boston,	" 23,	Isaac Ames.
Munson, Selden J.	Springfield,	" 7,	Henry Vose.
Patch, Abraham, Jr.	Wenham,	" 19,	John G. King.
Perkins, Asa	Bridgewater,	" 26,	Welcome Young.
Peters, Thomas De Blois¶	Roxbury,	" 14,	John P. Putnam
Peyser, Samuel	Boston,	" 8,	John P. Putnam.
Phelps, George S.††	Northampton,	" 26,	H. H. Chilson.
Peirce, Isaac	Boston,	" 27,	John M. Williams.
Pierce, John R.	Barre,	" 23,	Charles Brimblecom.
Plaisted, Daniel‡‡	Charlestown,	" 5,	Asa F. Lawrence.
Reed, Isaac T.†	Boston,	" 16,	John P. Putnam.
Richardson, Joseph W.	Cohasset,	" 28,	Charles Endicott.
Robbins, Louis S.	Boston,	" 24,	Isaac Ames.
Rogers, Fitz William‡‡	Andover,	" 5,	Asa F. Lawrence.
Rogers, Henry L.	Springfield,	Dec. 13, 1854,	Henry Vose.
Shattuck, Luther	Pepperell,	Feb. 28, 1855,	Isaac S. Morse.
Smallwood, George T.**	Boston,	" 23,	Isaac Ames.
Smith, Theophilus S.	Lowell,	" 1,	Isaac S. Morse.
Somes, R. S.	Groveland,	" 27,	John G. King.
Stearns, Charles	Littleton,	" 6,	Isaac S. Morse.
Stetson, Joshua, Jr.	Walpole,	" 20,	Francis Hilliard.
Straw, Benjamin	Lynn,	" 19,	John G. King.
Tillotson, Wm.	Northampton,	" 19,	H. H. Chilson.
Tucker, Joseph W.	Boston,	" 23,	John M. Williams.
Viles, Nathan, Jr.	Boston,	" 8,	Charles Demond.
Way, John M.	Roxbury,	" 9,	Francis Hilliard.
Webster, Levi	Chester Factories,	Dec. 9, 1854,	Henry Vose.
Wheeler, Elisha T.	Berlin,	Feb. 17, 1855,	T. G. Kent.
White, Windsor	Templeton,	" 9,	C. H. B. Snow.
Whitehouse, Moses	Charlestown,	" 5,	Isaac S. Morse.
Whitney, Rufus H.	Boston,	" 1,	John M. Williams.
Winslow, Wm.	Charlestown,	" 23,	John M. Williams.
Wiswall, Timothy	Canton,	" 10,	Charles Endicott.
Woodruff, Wm. B.	East Bridgewater,	" 26,	Welcome Young.
Wright, Enos, Jr.††	Northampton,	" 26,	H. H. Chilson.
Zimmerman, John A.	Salem,	" 7,	John G. King.

* Arnold & Butts.
† Calkins, Reed & Bangs.
‡ J. Q. Hoyt & Co.
§ Firm not stated.
‖ B. A. & I. A. Longley.
¶ Martin & Peters.
** Smallwood & Morton.
†† Wright & Phelps.
‡‡ Rogers & Plaisted.